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Supreme Court, U.S.
FILED

No. 10-178 AUG 2 - 2010

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IN THE
Supreme Court of the United States

SHAWN M. LOCKETT, ET AL., PETITIONERS,

v.

NEW ORLEANS CITY, ET AL.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

MICHAEL R. ALLWEISS
Counsel of Record

Lowe, Stein, Hoffman,
Allweiss & Hauver, L.L.P.
701 Poydras Street
Suite 3600
New Orleans, Louisiana 70139
(504) 581-2450
MALLWEISS@LSHAH.COM

CURRY & TAYLOR ♦ 202-393-4141

QUESTIONS PRESENTED

1. Whether, under this Court's decision in *Atwater v. City of Lago Vista*, qualified immunity may be afforded and 42 U.S.C. § 1983 false arrest and unlawful search and seizure claims arising out of an alleged racially motivated traffic stop may be dismissed as a matter of law when the facts relevant to a probable cause determination are disputed.

2. Whether, under this Court's decision in *Atwater v. City of Lago Vista*, a state law false arrest claim arising out of alleged traffic violations may be dismissed as a matter of law absent a review of relevant state law.

3. Whether the claim of excessive force under the Fourth Amendment is restricted to plaintiffs who demonstrate more than *de minimis* injury and allege injury caused by more than handcuffing too tightly.

4. Whether claims asserted under 42 U.S.C. §§ 1985 and 1986 alleging discriminatory animus and facts in support thereof may be dismissed for lack of discriminatory animus as a matter of law absent a factual determination of discriminatory animus by a trier of fact.

PARTIES TO THE PROCEEDING

Petitioners: Shawn M. Lockett; Melanie C. Lockett

Respondents: NEW ORLEANS CITY

PIYUSH JINDAL, also known as Bobby Jindal, in his official capacity as Governor of Louisiana

CLARENCE RAY NAGIN, Mayor, in his official capacity as Mayor of New Orleans

WARREN RILEY, Superintendent, in his official capacity as of the New Orleans Police Department

CHRISTOPHER AHNER, individually and in his official capacity as Master Sergeant in the Louisiana Air National Guard

JONATHAN BIEBER, individually and in his official capacity as a member of the Louisiana National Guard

BRANDT ARCENEAUX, individually and in his official capacity as a member of the Louisiana National Guard

LYNN FLETCHER, individually and in his official capacity as a Lieutenant in the New Orleans Police Department

REGINALD GAINS, individually and in his official capacity as a New Orleans Police Officer
TOCKA CLARK, individually and in her official capacity as a New Orleans Police Officer

JOSEPH THOMAS, individually and in his official capacity as a Southern University of New Orleans Campus Police Officer

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The opinion of the Court of Appeals, Fifth Circuit, is reported at 607 F.3d 992, and is reprinted in the Appendix to the Petition at p. 1a.-21a. The District Court's opinion granting motion to dismiss and summary judgment is reported at 639 F.Supp.2d 710 and is reprinted in the Appendix to the Petition ("Appendix") at p. 56a-141a. The District Court's opinion granting motion to dismiss, or alternatively, motion for summary judgment is not reported but available electronically at 2009 WL 2390810 and is reprinted in the Appendix at p. 39a-55a . The District Court's opinion denying motion for new trial is not reported and is reprinted in the Appendix at p. 22a-36a.

JURISDICTION

The Court of Appeals entered its judgment on May 5, 2010. This Court has jurisdiction under 28 USC § 1254 (1).

RELEVANT PROVISIONS INVOLVED

U.S. CONST. AMEND IV

42 U.S.C. § 1983

42 U.S.C. § 1985 (3)

42 U.S.C. § 1986

La. Code of Cr. Proc. art. 213

La. Rev. Stat. 32:391C

(see appendix)

STATEMENT

Resolutions of the questions presented here will largely determine the value of the Fourth Amendment and the protections afforded therein. Recent high profile cases have drawn the nation's attention and fueled the debate concerning an ongoing abuse of authority by law enforcement officers who deprive citizens of basic constitutional rights. These instances include but are not limited to the arrest of an African American Harvard Professor, Henry Louis Gates, Jr. and the fatal shootings of unarmed citizens by New Orleans Police Department (NOPD) officers and the related conspiracy to cover-up the events.[1]

The Fifth Circuit's published opinion affirming the dismissal of Lockett's claims on motions for summary judgment, which in large part relies on the Supreme Court precedence set forth in *Atwater v. City of Lago Vista*, 532 U. S. 318, 121 S.Ct. 1536, 149 L. Ed. 2d. 549 (2001), predicates its legal analysis on a determination of fact relevant to a probable cause determination and dismisses on summary judgment. This opinion widens the door of potential for officers to maliciously abuse their authority by racially profiling citizens, improperly engaging in traffic stops, and, at their discretion, arresting citizens for alleged probable cause fabricated after the fact.[2] Under the Fifth Circuit's opinion, notwithstanding allegations and evidence contradicting a probable cause determination, officers will be entitled to qualified immunity thereby rendering the Fourth Amendment and the citizens invoking its protections powerless.

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[1] See generally, *Harvard Professor Gates Arrested at Cambridge Home*, http://www.boston.com/ news/ local/ breaking_news/ 2009/07/harvard.html; Danziger *Bridge Shootings*, http://en.wikipedia.org/wiki/Danziger_Bridge_Shootings; *What happened on New Orleans Danziger Bridge*, September 3, 2006, http://www.npr.org/templates/story/story.php?storyId=6063982.

A. Factual Background.

On the morning of July 1, 2008, Lockett, a black male, left his home to drive to Southern University New Orleans ("SUNO"), a historically black university, to attend class. While on a common driveway shared by SUNO's North Campus and the FBI Academy, Lockett noticed a military police vehicle behind him with its lights on and heard one pulse of its siren. Lockett pulled over and parked. The military police vehicle that pulled Lockett over was manned by defendants, Bieber and Arceneaux.

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[2] Notably, Justice O'Connor along with Justices Stevens, Ginsburg, and Breyer dissented to the majority decision in *Atwater v. City of Lago Vista.* Justice O'Connor expressed concern regarding the amount of discretionary authority afforded to officers and the potential for abuse thereof. In the dissent, Justice O'Connor made the following statement which is apposite.

> As the recent debate over racial profiling demonstrates all too clearly, a relatively minor traffic infraction may often serve as an excuse for stopping and harassing an individual. . . Because an officer's subjective motivations for making a traffic stop are not relevant considerations in determining the reasonableness of the stop, the courts "must vigilantly ensure that officers' post-stop actions- which are properly within our reach- comport with the Fourth Amendment's guarantee of reasonableness." *Atwater v. City of Lago Vista*, 532 U.S. 318, 372 (2001).

Bieber approached Lockett's vehicle and aggressively asked whether he knew how fast Lockett was driving. Lockett advised him that he did not, but that he was driving with the flow of traffic. Then, Bieber, in a very agitated tone, asked Lockett where he was going. Lockett advised that he was going to class. Bieber said, "How would you like it if I went in there and talked to your instructor" and gestured toward the FBI building. Lockett responded, "No sir, I'm going to class at SUNO." Bieber than yelled in a hostile and derogatory manner, "You **need** to go to SUNO!" Lockett asked Bieber what he meant by that statement. In response, Bieber yelled at Lockett ordering him out of the vehicle and to provide his license, registration, and proof of insurance. Lockett did so.[3] Bieber also searched/frisked Lockett.

Lockett felt uneasy and on edge because of Bieber's racially charged statement and his constant aggression towards him. So, Lockett called 911 to request New Orleans police presence. Lockett also spoke with and asked his wife[4] to meet him at the scene.

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[3] Lockett's proof of insurance card had recently expired. Lockett explained that the vehicle was insured, but that he failed to put the new proof of insurance card in the vehicle, and that he would call GEICO for proof of current insurance.

[4] Melanie Lockett is an attorney, but not counsel of record in this proceeding.

Arceneaux knew that Lockett was on the phone with a 911 operator reporting the racially charged situation and requesting New Orleans Police Department presence. Immediately after Lockett placed the 911 call, Arceneaux performed a search/frisk on him. Then, Arceneaux directed Lockett to return to his vehicle.

Upon learning that Lockett was calling 911 to report the racially charged situation, Bieber returned to the military police vehicle and called radio dispatch to advise of the stop and to call his supervisor, Ahner to advise of the situation. From this point forward, Bieber admits Lockett was detained because he called 911. Ahner asked Bieber whether his safety was in jeopardy and Bieber responded that everything was under control. Nonetheless, Bieber requested Ahner's presence on the scene and Ahner called a New Orleans Police Department supervisor, Fletcher, to request his presence on the scene, as well.[5] Fletcher thereafter requested the presence of additional NOPD officers.

Before Ahner or Fletcher arrived on the scene, Thomas, a SUNO police officer, arrived in his vehicle. Thomas pulled up to Lockett's vehicle, and Lockett explained what happened. At that time, Lockett mentioned that he was being treated in a hostile and racist manner, being detained for an unknown reason, and that he had been detained for awhile and was late for class. Thomas talked to Arceneaux and Bieber. Thomas remained on the scene.

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[5] Fletcher testified during his deposition that he was also called to the scene in response to Lockett's 911 call.

Upon Ahner's arrival, Ahner asked Lockett to step out of his vehicle, searched him, and handcuffed him with his wrists painfully between his scapula bones. Fletcher, NOPD officers Clark and Gains, and Lockett's wife arrived on the scene. Ahner put Lockett in the back of a military police vehicle. As Ahner put Lockett in the vehicle, Lockett asked him whether he was under arrest. Ahner retorted that Lockett was not under arrest but asked if Lockett wanted to be. Lockett responded that he plead the Fifth because, at that point, Lockett felt it would be best for him to keep his mouth shut. The windows were raised in the military police vehicle.

While in custody in the back of the military police car, Fletcher and Ahner, individually, questioned Lockett several times. After each time, Fletcher, Ahner and certain other officers huddled amongst themselves before returning to Lockett. During the questioning, Lockett advised that the military police made a racially charged statement against him. Both Fletcher and Ahner told Lockett that they were trying to determine whether to arrest him or to give him a ticket.

Importantly, neither Bieber nor Arceneaux utilized a radar to determine Lockett's speed or advised Lockett of the speed at which he was allegedly driving prior to Lockett's call to 911. Only after Lockett was handcuffed in the back of the military police vehicle did Fletcher first advise him of the alleged speed, over 100 mph. Lockett immediately denied driving anywhere near that speed and explained that he could not drive over 100 mph because his vehicle contains a computer chip that prohibited driving in excess of that speed. Later, Ahner and Fletcher told Lockett's wife that Lockett was driving at approximately 90 mph. Bieber and Arceneaux testified that Lockett was driving at approximately 75 mph but that after they observed him they turned onto the road to follow him from a complete stop and were gaining on him while driving approximately 70 mph.[6] As time went on, additional allegations of Lockett's failure to observe a stop sign and a red light appeared in reports. Lockett disputes these alleged violations, as well.

Gaines and Clark witnessed Lockett in custody in handcuffs in the back of the military police car. While Lockett was in the back of the military police vehicle, Clark tapped on the window of the military police vehicle and directed Arceneaux to roll down the window because it was hot outside. Arceneaux did so. Later, Arceneaux asked Lockett to step out of the military policy vehicle and Arceneaux readjusted Lockett's handcuffs and mirandized Lockett. At that time, Lockett asked Arceneaux to allow him to stretch his arms. Arceneaux allowed Lockett to briefly stretch before reapplying the handcuffs more appropriately. Arceneaux put Lockett back into the military police vehicle.[7]

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[6] Defendants limited their arguments in the courts below to asserting that Lockett was exceeding the speed limit. In light of the inconsistencies within defendants testimony and evidence alone, to do otherwise would be unsustainable.

[7] Arceneaux denies readjusting Lockett's handcuffs and reading Lockett his Miranda rights. Mrs. Lockett witnessed a military police officer readjust Lockett's handcuffs, allow Lockett to stretch his arms, and place him back in the military police vehicle. Ahner testified that he read Lockett his Miranda rights and that

Lockett was asked to step out of the military police vehicle, his handcuffs were changed, and he was patted down again by Gains, and placed in the New Orleans Police Department vehicle. Just as Gains started to pull away from the scene, Ahner approached the vehicle and instructed Lockett to reiterate to Ahner that Ahner was in charge. Ahner made continuing statements similar to this one and did not stop until Lockett responded that he understood and Ahner was in charge. Gains and Clark left the scene with Lockett at approximately 10:11 a.m. -more than one hour after the initial stop. Gains and Clark brought Lockett to Central Lockup where he was fast tracked and ultimately released at or about 1:26 p.m.

Shortly after Lockett's release, Mrs. Lockett took pictures of the red chaffing on Lockett's wrists. That day, the Locketts registered a formal complaint with Captain Douget at the military police headquarters.

B. Proceedings Below.

On October 22, 2008, Shawn M. Lockett and Melanie C. Lockett filed a Complaint against all defendants named in the caption.[8] Lockett asserted

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Lockett's handcuffs were adjusted but that he was uncertain of who readjusted them.

[8] The district court granted state defendants' motion to dismiss Jindal, Ahner, Arceneaux, Bieber, and Thomas in their official capacities without prejudice upon finding that state defendants had not waived Eleventh Amendment immunity and upon further finding that Lockett failed to allege a likelihood of future violations of rights sufficient to merit prospective injunctive relief.

claims arising out of a racially motivated false arrest under 42 U.S.C. §§ 1981, 1983, 1985(3), 1986, and 1988, as well as, supplemental state law claims including assault and battery, false arrest, false imprisonment, malicious abuse of power, intentional infliction of emotional distress, loss of reputation, emotional distress, humiliation, embarrassment, pain and suffering, and negligence.[9]

On May 13, 2009, state defendants filed a Motion for Summary Judgment alleging state defendants merit qualified immunity and further challenging the viability of plaintiffs' claims. On May 22, 2009, city defendants filed a Motion to Dismiss, or Alternatively, Motion for Summary Judgment largely adopting state defendants' arguments and version of facts.[10] Lockett contested entitlement to immunity because genuine issues of material fact exist as to whether defendants maliciously violated Lockett's constitutional rights and failed to act in an objectively reasonable manner to retaliate against Lockett for reporting race discrimination and harassment. At the June 17, 2009 pretrial conference, the court advised of its inclination to grant defendants' motions for summary judgment.[11]

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[9] Mrs. Lockett asserted state law claims for emotional distress against defendants, Bieber, Areeneaux, Ahner, Fletcher, Gains, Clark, and Thomas which are not at issue in this Petition.

[10] The district court properly treated city defendants' motion as one for summary judgment.

[11] Plaintiffs requested oral argument. However, the Court cancelled oral argument and rendered a decision on the briefs.

On June 26, 2009, the district court issued its eighty nine (89) page Order and Reasons granting state defendants' motion to dismiss and motion for summary judgment. Thereafter, on June 30, 2009, the district court issued its Order and Reasons granting city defendants' motions for summary judgment. On July 7, 2009, the district court entered Judgment in favor of defendants and against plaintiffs, dismissing plaintiffs' claims at plaintiffs' costs.

On July 13, 2009, plaintiffs filed a Motion for New Trial to address manifest errors of law and mistakes of fact. Plaintiffs requested oral argument on their motion. Defendants opposed plaintiffs' Motion for New Trial. Prior to the scheduled hearing date, and without the benefit of oral argument or plaintiffs' reply memorandum, on July 30, 2009, the district court denied plaintiffs' Motion for New Trial.

On August 6, 2009, plaintiffs filed a Notice of Appeal. On May 5, 2010, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court. The Fifth Circuit made a factual finding relevant to the probable cause inquiry and used the same as a predicate to its legal conclusions. Specifically, notwithstanding the record of inconsistencies, the Fifth Circuit held that no genuine issue of material fact existed as to whether defendants had probable cause to believe Lockett was speeding. Therefore, under *Atwater*, Lockett had not alleged facts sufficient to make out a false arrest claim and defendants were entitled to qualified immunity.[12] The remainder of the Fifth Circuit's legal conclusions rested at least in part on this flawed assumption of material fact.

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[12] The Fifth Circuit relied in part on a quote from Lockett's brief and stated that Lockett conceded that defendants had probable

The Fifth Circuit further dismissed Lockett's excessive force claim upon finding that Lockett's claim boiled down to an allegation that handcuffs were too tight and Lockett's injuries were *de minimis*. In applying this bright line rule to determine the validity of an excessive force claim, the Fifth Circuit ignored the actual injury sustained which includes but is not limited to the excessive force used in an abuse of authority by subjecting Lockett, a compliant citizen in custody, to multiple unlawful searches and seizure, and painful handcuffing allegedly in retaliation for making a complaint. The Fifth Circuit further dismissed Lockett's claims of unconstitutional searches and seizure finding that, while Lockett's multiple searches were unconstitutional under *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), they were not unreasonable. Therefore, defendants are entitled to qualified immunity. The Fifth Circuit further dismissed Lockett's claims asserted under 42 U.S.C. §§ 1985 (3) and 1986 based on its holding that defendants had probable cause to stop and arrest Lockett and its

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cause to stop him. However, the statement relied on was part of an argument and taken out of context. In fact, the paragraph in which the statement was made was prefaced by "[e]ven assuming *arguendo* . . . ." It is undisputed that Lockett's testimony is that he was driving with the flow of traffic. Lockett has not conceded to speeding. Appendix, p. 4a. and 8a. Moreover, contrary to the Fifth Circuit's recitation of Lockett's arguments, Lockett did and does contest probable cause for the initial stop, as more fully set forth in Appellants' Reply Brief to the Fifth Circuit Court of Appeals.

determination that the allegation claimed to demonstrate racial animus was insufficient to raise a genuine issue of material fact. The Fifth Circuit cited no authority or standard upon which to base its resolution of this factual issue.

Finally, the Fifth Circuit wholly ignored Lockett's appeal pertaining to the substance of the state law claims and limited its analysis of Lockett's state law claims to a decision regarding whether military police defendants were immune under state law, La. Rev. Stat. 29:23, an issue that is not before this Court.[13] In so doing, the Fifth Circuit failed to analyze Lockett's false arrest claim under state law.

REASONS FOR GRANTING THE PETITION

The United States Court of Appeal for the Fifth Circuit has entered a decision so far departing from the accepted and usual course of judicial proceedings and stare decisis that an exercise of this Court's supervisory power is merited.

The claims at issue were dismissed on summary judgment. Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Evidence is viewed in the light most favorable to the non-movant. *Coleman v. Houston Ind.*

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[13] The issue of military police immunity as to state law claims is not before this Court. However, liability for claims brought under state law is still at issue as not all defendants are military police.

School Dist., 113 F.3d 528, 533 (5th Cir. 1997). When the evidence is such that a reasonable jury could return a verdict for the non-movant, a genuine issue of material fact exists. *Anderson v. Liberty Lobby, Inc.*, 477 US 242, 248 (1986). "Summary judgment is appropriate where the underlying facts are undisputed, and the record reveals no evidence from which reasonable persons might draw conflicting inferences about the facts." *Prinzi v. Kevdril Co.*, 738 F.2d 707, 709 (5th Cir. 1984). "Summary judgment is not appropriate when questions about the credibility of key witnesses loom . . . large and the evidence could permit the trier-of-fact to treat their testimony with 'skeptical scrutiny.'" *Deville v. Marcantel*, 567 F.3d 156 (5th Cir. 2009). "Summary judgment 'was not intended to . . . deprive a litigant of, or at all encroach upon, his right to a jury trial." *Nunez v. Superior Oil Company*, 572 F.2d 1119 (5th Cir. 1978).

(1) The facts upon which the alleged probable cause are based are disputed, and therefore, dismissal of Lockett's claims under 42 U.S.C. § 1983 encroaches upon his constitutional right to seek redress for acts violative of his constitutional rights."To succeed on a claim under 42 U.S.C. § 1983, plaintiff must establish that defendants deprived plaintiff of constitutional rights and the conduct forming 'the basis of the alleged constitutional declaration that constitutes state action under color of law.'" *Morris v. Dillard Dept. Store, Inc.*, 277 F.3d 743, 747 (5th Cir. 2001).

In *Atwater v. City of Lago*, 532 U. S. 318, 121 S.Ct. 1536, 149 L. Ed. 2d. 549 (2001), this Court held that an arrest made with probable cause was not unreasonable or violative of the Fourth Amendment. Relying on this ruling, the Fifth Circuit held that the defendant officers had probable cause to arrest Lockett for alleged traffic violations and in large part predicating its analysis on this determination of fact, dismissed Lockett's § 1983 claims of false arrest, unconstitutional searches and unconstitutional seizure as a matter of law.

Here, unlike in *Atwater*, facts materially relevant to a probable cause determination are disputed.[14] Therefore, the issue of qualified immunity as it concerned Lockett's § 1983 false arrest claim should not have been summarily decided because the alleged traffic violations, *i.e.* the facts relevant to a probable cause determination, are disputed. Notwithstanding a defendant officer's admission that Lockett was detained because he called 911, the Fifth Circuit relied on its ruling that probable cause for Lockett's arrest existed and held that his seizure was lawful as a matter of law. Notwithstanding the lack of evidence suggesting fear and suspicion that Lockett was armed, the Fifth Circuit relied in part on its probable cause determination and held that multiple searches of Lockett's person were unconstitutional, yet reasonable as a matter of law. Subjecting these claims to dismissal without affording an opportunity to the trier of fact to resolve the factual dispute relevant to a probable cause determination necessarily infringes on Lockett's rights and will ultimately limit a citizen's right to redress constitutional violations to those instances in which defendant officers acquiesce to acting without probable cause.

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[14] Lockett suggests that the officers fabricated traffic violations in an attempt to justify a retaliatory arrest made as a result of his claim of race discrimination.

(2) This Court's ruling in *Atwater* does not limit a citizen's right to seek redress under state law for false arrest. In *Atwater*, the court noted that many states have chosen to impose more restrictive safeguards than that afforded under the Fourth Amendment through statutes limiting warrantless arrest for minor offenses and cited La. Rev. Stat. Ann. §32:391(West 1989). Notwithstanding the foregoing, the Fifth Circuit declined to consider Lockett's false arrest claim asserted under state law which necessarily mandates review of relevant state law. This is true especially when, as here, state law requires either the release of citizens who have committed traffic violations, or in certain limited instances, the immediate arrest thereof.[15] Louisiana courts recognize that, notwithstanding *Atwater*, "arbitrary or non-customary decisions to arrest might not lead to reasonable seizures as constitutionally defined." *Garrett v. City of Bossier City*, 792 So.2d 24 (La. App. 2 Cir. 6/20/01). Therefore, "[a]n officer's exercise of the discretion to arrest for a minor misdemeanor offense must be reasonable rather than arbitrary." To determine reasonableness, in addition to probable cause, the court must find circumstances requiring an immediate arrest for an offense which customarily requires a summons. *Id.*

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[15] La. Code of Cr. Proc. art. 213 and La. Rev. Stat. § 32:391. Appendix, p. 144a-148a. The Fifth Circuit stated that "the only challenge that [Lockett] adequately raises is that the district court improperly held that the military police were immune under Louisiana law." Appendix, p. 18a. However, in his appellant's brief and reply, Lockett specifically claims that genuine issues of material fact exist as to whether defendants had probable cause to arrest Lockett and further claims that the district court's ruling dismissing Lockett's state law claims was flawed as it was based on the flawed analysis of Lockett's § 1983 claims.

(3) The bright line standard applied by the Fifth Circuit to Lockett's excessive force claim is inconsistent with the rulings of this Court and the Fifth Circuit, itself, in that it requires more than *de minimis* injury and allows for the dismissal or exclusion of claims of handcuffing too tightly, without more.

Under the stare decisis of this Court, excessive force claims asserted under the Fourth Amendment require "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers and to the others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham v. M.S. Connor*, 490 U. S. 386, 396, 109 S. Ct. 1864, 1872 104 L. Ed. 2d. 443(1989). Here, Lockett claims that he was injured as a result of being subjected to a false arrest, unconstitutional seizure, searches, and painful improper handcuffing.[16] A bright line rule requiring the showing of more than *de minimis* injury sustained for a reason beyond handcuffing too tightly does not adequately afford the protections to which citizens are entitled under the Fourth Amendment and fails to comport with the requirement to consider the factors articulated by this Court.

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[16] An officer testified that he continued to seize Lockett because he called 911, notably, not because he had probable cause to do so. The officers on the scene held Lockett on the scene for approximately one hour after the initial traffic stop to determine whether or not to arrest him. Various officers searched Lockett's person a total of four times prior to his being taken to central lockup.

The Fifth Circuit cites to its holding in *Glenn v. City of Tyler*, 242 F.3d 307 (5th Cir. 2001) articulating this bright line rule. However, in *Glenn*, the Fifth Circuit held that "handcuffing too tightly, without more [such as a showing of malice], does not amount to excessive force." *Id.* [17] Lockett alleged malice. Specifically, he alleged that he was subjected to excessive force out of malice in retaliation for his reporting racial discrimination. Therefore, even if this bright line rule is constitutionally permissible, it is not applicable here.

(4) The question of whether racial animus exists is an issue of fact that should be reserved for the trier of fact. This Court has clearly articulated the statutory requirements for a claim under 42 U. S. C. § 1985 which include:

(1) A conspiracy;

(2) For the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws;

(3) An act in furtherance of the conspiracy;

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[17] See also *Crow v. Comal County, TX*, 2001 WL 1910555 (W.D. Tex. 6/13/01); *Henderson v. Ward*, 2001 WL 969101 (E.D. La. 8/22/01).

(4) Whereby a person is either injured in his person or property or deprived of any right or privilege of a citizen of the United States.

United Brotherhood of Carpenters and Joiners of America, Local 610, AFL-CIO v. Scott, 463 U.S. 825, 103 S. Ct. 3352, 77 L. Ed. 2d. 1049 (1983). The deprivation of the equal protection of the laws must be motivated by discriminatory animus. *Id.* Indisputably, Lockett properly alleged all elements of the claim. A genuine issue of material fact exists as to whether the allegation regarding racially discriminatory animus is sufficient to prove the same. The Fifth Circuit decided as a matter of law that it was not. This issue is one of fact and should be presented to the trier of fact.

CONCLUSION

The Petition for a Writ of Certiorari should be granted. Leaving the Fifth Circuit's decision in tact will have a lasting and rippling effect throughout the nation attenuating the protections afforded under the Fourth Amendment of the Constitution.

Respectfully submitted,

MICHAEL R. ALLWEISS (2425)
LOWE, STEIN, HOFFMAN,
ALLWEISS & HAUVER, L.L.P.
701 Poydras Street,
Suite 3600
New Orleans, Louisiana 70139-7735
(504) 581-2450

(504) 581-2461 (Fax)
MALLWEISS@LSHAH.COM

Attorney for Petitioner, Shawn M. Lockett

No. 09-30712 Summary Calendar

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SHAWN M. LOCKETT; MELANIE C. LOCKETT,
Plaintiffs-Appellants

v.

NEW ORLEANS CITY; PIYUSH JINDAL, also known as Bobby Jindal, in his Official Capacity as Governor of Louisiana; CLARENCE RAY NAGIN, Mayor, in his Official Capacity as Mayor of New Orleans; WARREN RILEY, Superintendent, in his Official Capacity as Superintendent of the New Orleans Police Department; CHRISTOPHER AHNER, Individually and in his Official Capacity as Master Sergeant in the Louisiana Air National Guard; JONATHAN BIEBER, Individually and in his Official Capacity as a member of the Louisiana National Guard; BRANDT ARCENEAUX, Individually and in his Official Capacity as a member of the Louisiana National Guard; LYNN FLETCHER, Individually and in his Official Capacity as a Lieutenant in the New Orleans Police Department; REGINALD GAINS, Individually and in his Official Capacity as a New Orleans Police Officer; TOCKA CLARK, Individually and in her Official Capacity as a New Orleans Police Officer; JOSEPH THOMAS, Individually and in his Official Capacity as a Southern University of New Orleans Campus Police Officer, Defendants-Appellees

May 5, 2010, Filed

NOTICE: PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

COUNSEL: For SHAWN M. LOCKETT, MELANIE C LOCKETT, Plaintiff - Appellants: Michael R. Allweiss, Lowe, Stein, Hoffman, Allweiss & Hauver, L.L.P., New Orleans, LA.

For NEW ORLEANS CITY, CLARENCE RAY NAGIN, Mayor, In his official capacity as Mayor of New Orleans, WARREN RILEY, Superintendent, In his Official Capacity as Superintendent of the New Orleans Police Department, LYNN FLETCHER, Individually and in his Official Capacity as a Lieutenant in the New Orleans Police Department, REGINALD GAINS, Individually and in his Official Capacity as a New Orleans Police Officer, TOCKA CLARK, Individually and in her Official Capacity as a New Orleans Police Officer, Defendant - Appellees: James Bryan Mullaly, City Attorney's Office, for the City of New Orleans, New Orleans, LA.

For PIYUSH JINDAL, also known as Bobby Jindal, In his Official Capacity as Governor of Louisiana, CHRISTOPHER AHNER, Indiviudally and in his Official Capacity as Master Sergeant in the Louisiana Air National Guard, JONATHAN BIEBER, Individually and in his Official Capacity as a member of the Louisiana National Guard, BRANDT ARCENEAUX, Individually and in his Official Capacity as a member of the Louisiana National Guard, JOSEPH THOMAS, Individually and in his Official Capacity as a Southern University of New Orleans

Campus Police Officer, Defendant - Appellees: John Bettes Dunlap, III, Jennifer Ann Fiore, Esq, Carleton Dunlap Olinde Moore & Bohman, L.L.C., Baton Rouge, LA.

Before BENAVIDES, PRADO, and SOUTHWICK, Circuit Judges.

OPINION

PER CURIAM: *

Plaintiffs-Appellants Shawn M. Lockett and his wife, Melanie C. Lockett, seek the reversal of the district court's grant of summary judgment for Defendants-Appellees in this civil rights action, which stems from his arrest based on a traffic violation. We affirm.

I. FACTUAL AND PROCEDURAL HISTORY

In July of 2008, Lockett was driving in his vehicle to a class at the Southern University of New Orleans (SUNO). At the same time, two military police officers, Jonathan Bieber and Brandt Arceneaux, were conducting patrol in the area as members of the National Guard Task Force assisting the New Orleans Police Department (NOPD) with law enforcement duties pursuant to an order issued by Governor Jindal after Hurricane Katrina. Bieber and Arceneaux observed Lockett's vehicle and believed it to be traveling over the speed limit. Based on this observation, the defendants effectuated a traffic stop of Lockett.

Lockett pulled over in a driveway that was in close proximity to both SUNO and the FBI building. Bieber walked to Lockett's vehicle and asked him if he knew how fast he was driving. Lockett responded that he did not know his speed but stated that he was driving with the flow of traffic. Bieber then asked Lockett where he was driving. Lockett stated that he was going to class. Bieber then gestured toward the FBI building and asked Lockett "how would you like it if I went in there and talked to your instructor?" After realizing that Bieber thought he was referring to a class at the FBI building, Lockett told Bieber that he was a student at SUNO. According to Lockett, Bieber responded: "You need to be at SUNO." Lockett was offended by the comment and asked Bieber why he would "say such a thing." In response, Bieber ordered Lockett to exit the vehicle and produce his license, registration and proof of car insurance. After Lockett exited the vehicle, Bieber frisked Lockett.

Lockett provided the documents requested; however, the insurance card in his possession had expired and he did not have proof of current insurance. Using his cell phone, Lockett called his insurance company in an unsuccessful attempt to prove to Bieber that he currently had the required insurance. Lockett also called the emergency number 911, reported that the military police officers had made racial slurs, and requested that NOPD officers be dispatched to the scene. He also called his wife Melanie and requested her assistance at the scene.[1] At about this time, Arceneaux frisked Lockett. A SUNO police officer, Joseph Thomas, stopped at the scene and Lockett complained to Thomas that he was being treated in a hostile and racist manner. Thomas then spoke to Arceneaux and Bieber.

After hearing Lockett request NOPD officers, Bieber called his supervisor, Christopher Ahner, and asked him to meet them at the scene. Ahner then called and requested the presence of Lynn Fletcher of the NOPD. Fletcher in turn called for an additional NOPD patrol car, which brought NOPD Officers Reginald Gains and Tocka Clark to the scene. Once Ahner arrived, he also frisked Lockett, affixed the handcuffs, and placed Lockett in the military police vehicle. By that time, Lockett's wife Melanie had arrived and witnessed her husband being placed in handcuffs.

At one point, NOPD Officer Clark asked Arceneaux to roll down the military vehicle's window because it was hot, and he complied. After the various defendants at the scene conferred, Lockett was arrested for reckless driving. NOPD Officer Gains frisked him and removed the military-issued handcuffs and placed NOPD handcuffs on Lockett. Gains and Clark took custody of Lockett and delivered him to jail. After about three hours, Lockett was released from jail. Later that day, he made a complaint at the office of the Louisiana National Guard that his wrists were hurt by the handcuffs. Ultimately, Lockett pleaded guilty to a non-moving violation, paid a fine, and the other charges were dismissed.

In October of 2008, Shawn and Melanie Lockett filed a complaint asserting claims arising out of Lockett's arrest against the City of New Orleans; Governor Jindal, in his Official Capacity as Governor of Louisiana; Clarence Ray Nagin, Mayor, in his Official Capacity as

Mayor of New Orleans; Warren Riley, Superintendent, in his Official Capacity as Superintendent of the NOPD; Christopher Ahner, Individually and in his Official Capacity as Master Sergeant in the Louisiana Air National Guard; Jonathan Bieber, Individually and in his Official Capacity as a member of the Louisiana National Guard; Brandt Arceneaux, Individually and in his Official Capacity as a member of the Louisiana National Guard; Lynn Fletcher, Individually and in his Official Capacity as a Lieutenant in the NOPD; Reginald Gains, Individually and in his Official Capacity as a NOPD officer; Tocka Clark, Individually and in her Official Capacity as a NOPD officer; and Joseph Thomas, Individually and in his Official Capacity as a SUNO campus police officer. The complaint alleged claims under 42 U.S.C. §§ 1981, 1983, 1985(3), 1986, and 1988, as well as numerous supplemental state law claims including assault and battery, false arrest, false imprisonment, malicious abuse of power, intentional infliction of emotional distress.

On May 13, 2009, the "state defendants," Ahner, Arceneaux, Bieber, and Thomas, filed a motion for summary judgment, arguing, among other things, that the claims were barred by qualified immunity. On May 22, the "city defendants," Mayor Nagin, NOPD Superintendent Warren Riley, NOPD Lt. Fletcher, and NOPD Officers Clark and Gaines filed a motion to dismiss, and in the alternative, a motion for judgment as a matter of law. On June 26, the district court issued an 89-page order and reasons granting the state defendants' motion to dismiss and motion for summary judgment. Four days later, the district court granted the city defendant's motion to dismiss and motion for summary judgment. On July 13, the plaintiffs filed a motion for new trial, which the district court denied. The plaintiffs now appeal.[2]

II. ANALYSIS

A. Standard of Review

This Court reviews a district court's grant of summary judgment de novo, applying the same standards as the district court. *See XL Specialty Ins. Co. v. Kiewit Offshore Servs.*, 513 F.3d 146, 149 (5th Cir. 2008); *Hirras v. Nat'l R.R. Passenger Corp.*, 95 F.3d 396, 399 (5th Cir. 1996). Summary judgment is proper if the record reflects "that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

B. 42 U.S.C. § 1983 claims

1. False Arrest

Lockett contends that the district court erred in finding that the defendants were entitled to qualified immunity with respect to his claim of false arrest. As set forth below, because there is no genuine issue of material fact as to whether the defendants had probable cause to believe that Lockett was driving in violation of the speed limit, his arrest does not violate the Fourth Amendment. The district court therefore properly afforded the defendants qualified immunity regarding his claim of false arrest.

The doctrine of qualified immunity shields government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). In *Saucier v. Katz*, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), the Supreme Court set forth a two-step inquiry for resolving government officials' qualified immunity claims: first, a court must decide whether the facts alleged or shown are sufficient to make out a violation of a constitutional right; second, the court must decide whether the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Id.* at 201. If the official's conduct violated a clearly established constitutional right, then qualified immunity is not applicable. Additionally, in a recent decision, the Supreme Court explained that "while the sequence set forth [in *Saucier*] is often appropriate, it should no longer be regarded as mandatory," and that judges "should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan*, U.S. , 129 S.Ct. 808, 818, 172 L. Ed. 2d 565 (2009).

Lockett concedes that "[a]t the moment of the traffic stop, [the officers] arguably had probable cause to stop [him] for careless driving." Nonetheless, he contends that because the officers have admitted that they did not believe that careless driving was an "arrestable offense," there was no probable cause to arrest him. Lockett relies on the following language in *Refendi v. Miller:* "Probable cause exists when the totality of the facts and circumstances *within a police officer's knowledge* at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." 203 F.3d 902, 903 (5th Cir. 2000) (emphasis in brief). Lockett misconstrues this precedent. That quoted language is referring to facts within the officer's knowledge--not whether the officer was aware of the legal consequences of the facts.

To analyze Lockett's claim, it is important to understand what he does *not* argue. In his brief, Lockett does not challenge the probable cause the officers had to make the traffic stop based on his speeding. Instead, Lockett asserts that "probable cause for a traffic stop is separate and distinct from the probable cause necessary to affect an arrest when the initial probable cause for the traffic stop is insufficient for the arrest." Lockett is mistaken. "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." *Atwater v. City of Lago Vista*, 532 U.S. 318, 354, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001). In *Atwater*, the very minor criminal offense was the plaintiff's failure to fasten a seatbelt. *Id.* at 349. Significantly, in its opinion, the Supreme Court *rejected* Atwater's contention that "it would not be reasonable to arrest a driver for speeding unless the speeding rose to the level of reckless driving." *Id.* at 349-50. Therefore, in the instant case, because the defendants had probable cause to believe that Lockett had been driving in violation of the speed limit, the arrest did not violate a clearly established constitutional right.

Nonetheless, Lockett claims that the defendants conspired to violate his "constitutional rights by stacking traffic violations against him to justify an arrest made in retaliation for complaining of race discrimination and harassment." Our precedent, however, "clearly dictates [that] subjective intent, motive, or even outright animus are irrelevant in a determination of qualified immunity based on arguable probable cause to arrest, just as an officer's good intent is irrelevant when he contravenes settled law." *Mendenhall v. Riser*, 213 F.3d 226, 231 (5th Cir. 2000).[3]

In sum, because there is no genuine issue of material fact with respect to whether the defendants had probable cause to believe Lockett was speeding, Lockett has not alleged facts sufficient to make out a claim of false arrest. Thus, the district court properly found that the defendants were entitled to qualified immunity with respect to the claim of false arrest.

2. Excessive Force

Lockett next contends that he has raised a fact issue with respect to his claim of excessive use of force, and thus, the district court erred in finding that the defendants were entitled to qualified immunity. To establish an excessive use of force claim, a plaintiff must demonstrate "(1) an injury (2) which resulted directly and only from the use of force that was excessive to the need and (3) the force used was objectively unreasonable." *Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2001) (citations and internal quotation marks omitted). Further, the "injury must be more than a de minimis injury and must be evaluated in the context in which the force was deployed." *Id.*

Lockett asserts that he sustained an injury to his wrists when the defendants affixed the handcuffs too tightly, causing him pain. Lockett has admitted that he did not complain to the defendants about the pain while he was handcuffed, and the jail's medical intake screening form does not indicate that Lockett complained of pain. However, after being released from the jail, Lockett and his wife met with Major Douget of the Louisiana National Guard, and he complained that the handcuffs had hurt his wrist. Also, several days later, Lockett visited a physician, complaining of pain in his wrists. However, at his deposition, Lockett testified he was not currently under his physician's care for the wrist injury.

Lockett's claim boils down to an allegation that the handcuffs were too tight. Such a claim, without more, does not constitute excessive force: "This court finds that handcuffing too tightly, without more, does not amount to excessive force." Glenn, 242 F.3d at 314; *accord Freeman v. Gore*, 483 F.3d 404, 417 (5th Cir. 2007) (rejecting as *de minimis* the plaintiff's claim "that the deputies twisted her arms behind her back while handcuffing her, 'jerked her all over the carport,' and applied the handcuffs too tightly, causing bruises and marks on her wrists and arms.").

Lockett also contends that the defendants' multiple searches of his person constitute excessive use of force. We first note that Lockett fails to allege an injury resulting from the pat downs. Further, Lockett's deposition testimony completely undermines his claim that the searches constituted excessive use of force. When Lockett was asked "[d]o you think there was anything inappropriate in the way [Bieber] searched you?," he responded: "No. It seemed like a standard search to me." Lockett also testified that Arceneaux searched him "[a]ppropriately." With respect to Ahner's search of his person, Lockett testified that Ahner's pat down was similar in manner to the previous two pat downs. Lockett further testified that, at one point, Arceneaux removed the handcuffs and allowed him to stretch his arms before putting the handcuffs back on "in a much more appropriate way, so instead of my arms being between my shoulder blades now they are just in a normal way behind my back." Lockett testified that after Ahner placed him once again in handcuffs, "it was much more comfortable." Subsequently, NOPD Officer Gains took off the handcuffs belonging to the Louisiana National Guard and replaced them with NOPD handcuffs. At that point, Lockett testified he was once again allowed to stretch his arms. Officer Gains also performed a "[g]eneral pat down" on Lockett as he was transferred to the custody of the NOPD.

In light of the above testimony and the lack of a "more than de minimis injury,"[4] we are persuaded that Lockett has failed to make a claim of excessive use of force with respect to the pat downs. Thus, the defendants were properly accorded qualified immunity with respect to the claim of excessive use of force.

3. Reasonableness of Search and Seizure

Lockett's final § 1983 claim is that the district court erred in granting the defendants qualified immunity because he raised a genuine issue of fact with respect to whether the defendants' conduct was objectively reasonable under the Fourth Amendment. He argues that the defendants' detention of him for approximately an hour and their multiple searches of his person were objectively unreasonable.

Length of Detention

As an initial matter, as set forth previously, the defendants did have probable cause to arrest Lockett and detain him. With respect to the length of the detention, because Lockett made three phones calls that lengthened the duration of his detention, we do not believe he has stated a claim that the defendants' conduct was objectively unreasonable. More specifically, Lockett's failure to have a current proof of insurance card and his subsequent phone call to his insurance company in an attempt to obtain proof of current insurance lengthened the detention. Lockett also made phone calls to: (1) the emergency number 911, requesting that NOPD officers meet him at the scene; and (2) his wife, requesting that she meet him at the scene. Additionally, we note that the transfer of custody of Lockett from the Louisiana National Guard to the NOPD added to the length of the detention. In light of these circumstances, we conclude that the one-hour detention is not unreasonable. Thus, we affirm the district court's grant of qualified immunity to the defendants as to the length of detention claim.

b. Multiple Searches

The district court held that defendants' multiple frisks of Lockett constituted illegal searches under Supreme Court precedent because there was no evidence that the defendants had a reasonable suspicion that Lockett was armed. The district court concluded that Lockett had alleged facts sufficient to constitute a violation of the Fourth Amendment, thus satisfying the first prong of the qualified immunity test. Nonetheless, the district court granted the defendants qualified immunity because it found that Lockett did not satisfy the second prong, which requires that the constitutional right was clearly established.

With respect to whether the defendants' searches of Lockett's person violated a clearly established right, the district court held as follows:

> Given the unique circumstances of this case, as well as the expressly open question in the Fifth Circuit of whether and to what extent the strictures of *Terry [v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)], apply to probable cause traffic stops for arrestable offenses, the Court finds that the MP Defendants are entitled to qualified immunity as to Lockett's *illegal search* claims under *Terry*, as the right at issue was not clearly established in light of the circumstances of this case.

The district court apparently was referring to this Court's recognition that "at least one of our sister circuits has recently suggested that different constitutional standards may apply to stops based on probable cause." *United States v. Brigham*, 382 F.3d 500, 506 n.4 (5th Cir. 2004) (en banc).[5] We find it unnecessary to address the first prong because we agree with the district court that it is not clearly established that the defendants' searches of Lockett's person were objectively unreasonable.

Here, the defendants had probable cause to stop Lockett based on their belief that he was speeding. As Lockett concedes, Bieber initially misunderstood Lockett to be stating that he was affiliated with the FBI. Lockett testified that Bieber's statement that Lockett "need[ed] to go to SUNO" disturbed him and that he asked Bieber "why [Bieber] would say such a thing?" Lockett concedes that he could not provide a current proof of insurance card and made a phone call to his insurance company in an attempt to obtain the required proof.[6] Lockett admits that he called "911" and informed the operator that the military police were "making racial slurs" and requested NOPD officers "because the situation looks like it's getting out of hand." Lockett then called his wife and asked her to meet him at the scene. As requested, NOPD officers and Lockett's wife arrived on the scene. In view of the defendants' initial misunderstanding regarding Lockett's FBI affiliation and Lockett's multiple phone calls requesting assistance of his attorney-wife and the presence of law enforcement officers from the NOPD in addition to the Louisiana National Guard at the scene, this was an *unusual* traffic stop. "The reasonableness of a Fourth Amendment search depends on the circumstances under which the search was conducted." *United States v. Garcia Garcia*, 319 F.3d 726, 731 (5th Cir. 2003).

More to the point, the Supreme Court has held that "in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *United States v. Robinson*, 414 U.S. 218, 235, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973).[7] We note that, like the instant case, *Robinson* involved an arrest based upon probable cause that a traffic violation had occurred. Today we make no attempt to set forth the state of the law in this Circuit regarding the limits on searching an arrestee's person during a traffic stop based on probable cause. Suffice it to say that it was not clearly established that the defendants' searches of Lockett's person were objectively unreasonable under the facts surrounding this arrest. n8 Thus, we affirm the district court's grant of qualified immunity to the defendants as to this claim.

C. 42 U.S.C. §§ 1985, 1986 claims

Lockett contends that the district court erred in dismissing his claims under § 1985. Section 1985(3) prohibits, among other things, conspiracies to deprive any person equal protection of the laws. To state a claim under § 1985(3), a plaintiff must allege facts demonstrating (1) a conspiracy; (2) for the purpose of depriving a person of the equal protection of the laws; and (3) an act in furtherance of the conspiracy; (4) which causes injury to a person or a deprivation of any right or privilege of a citizen of the United States. *Hilliard v. Ferguson*, 30 F.3d 649, 652-53 (5th Cir. 1994). Additionally, the conspiracy must also have a racially based animus. *Id.* at 653.

Lockett asserts that the defendants conspired to deprive him of his constitutional rights based on his race and that the district court erred because he created a genuine issue of fact with respect to this claim. Lockett points to the following statement defendant Bieber made to Lockett: "You need to be at SUNO." From this short statement, Lockett testified that he understood Bieber meant that: "SUNO being an

African-American university and him telling me that I need to go there as a substandard school that obviously he was insinuating that an African-American school was a substandard school."

We agree with the district court that Bieber's statement as alleged by Lockett does not demonstrate the racial animus needed to raise a genuine issue of material fact. This conclusion is supported by the undisputed fact that, although the driveway upon which the traffic stop occurred lead both to the FBI building and SUNO, when Lockett told Bieber he was going to class, Bieber assumed Lockett meant he was in training with the FBI--not SUNO. Moreover, as set forth above, the defendants had probable cause to stop and arrest Lockett. He was not detained for an unreasonable length of time and the defendants' pat-down searches of him have not been shown to have violated clearly established rights. Indeed, his previously set forth deposition testimony describing the defendants' treatment of him during the searches (and adjustment of his handcuffs) undermine any allegation of an act intended to injure him. We conclude that he has not demonstrated facts sufficient to demonstrate a conspiracy to deprive him of equal protection and the required act in furtherance of the conspiracy that caused injury or deprivation of any right. We therefore affirm the district court's grant of summary judgment in favor of the defendants with respect to Lockett's § 1985(3) claim.

Lockett also asserts a claim under § 1986, which provides that "[e]very person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 . . . are about to be committed, and having power to prevent or aid . . . neglects or refuses so to do . . . shall be liable to the party injured." Having failed to demonstrate a claim under § 1985, by definition Lockett cannot sustain a claim under § 1986. *Galloway v. State of La.*, 817 F.2d 1154, 1159 n.2 (5th Cir. 1987).

D. State law claims

Lockett also contends that the district court improperly dismissed his state claims as a matter of law. The only challenge that he adequately raises is that the district court improperly held that the military police were immune under Louisiana law. Lockett contends that under Louisiana law, the military police should not have been granted immunity. Lockett relies on the following statutory language:

> This Section is not intended to prevent Civil Code Article 2320 or other such laws from imposing master-servant liability on the state, or to prevent Civil Code Articles 2315 et seq. generally from imposing liability in circumstances to which such codal articles and/or laws would otherwise impose liability for damages caused by the offenses or quasi offenses of members of the National Guard committed within the course and scope of their National Guard duties when the Federal Tort Claims Act does not apply.

La. Rev. Stat. 29:23.1. However, as stated by the district court, that statute expressly applies only to causes of action that arise during the time a National

Guard member is in training or the member's status has not yet been activated.

The district court granted immunity based on the following statute, which provides as follows:

> No officer or other member of the military forces of this state shall be indicted, prosecuted, or sued for any injury to any person or property performed or committed by him while in the active service of the state of Louisiana in the course of the business of the military forces of this state as required of him by this Part.

La. Rev. Stat. 29:23. In his brief, Lockett does not dispute that the military police defendants were in the course of the business of the military forces of Louisiana during the arrest at issue. Accordingly, the district court properly found that § 23 applied and granted the military police qualified immunity.

E. Bystander claim

Lockett's final claim is that the district court improperly dismissed Melanie Lockett's bystander claim brought pursuant to La. Civ. Code art 2315.6, which allows a spouse "who view[s] an event causing injury" to his or her spouse to recover damages for mental anguish or emotional distress. More specifically, "the injured person must suffer such harm that one can reasonably expect a person in the claimant's position to suffer serious mental anguish or emotional distress from the experience, and the claimant's mental anguish or emotional distress must be severe, debilitating, and foreseeable." *Id.*

We agree with the district court that Lockett has not raised a genuine issue of material fact regarding whether Melanie witnessed Lockett suffer any injury that one can reasonably expect would cause her severe, debilitating distress. Thus, the district court properly denied Lockett relief on this claim.

III. CONCLUSION

For the above reasons, he judgment of the district court is AFFIRMED.

Footnotes

*Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

1Melanie Lockett is an attorney but she is not an attorney for the plaintiffs in this proceeding.

2The plaintiffs do not appeal the dismissal of their claims against the defendants in their official capacities.

3We note that because Lockett has raised a fact issue with respect to whether he committed moving violations in addition to speeding, we do not rely on those alleged offenses in finding as a matter of law that the defendants had probable cause to arrest him.

4*Glenn*, 242 F.3d at 314.

5The analysis in *Brigham* did not involve a traffic stop based on probable cause. 382 F.3d at 506 n.4.

[6] La. Rev. Stat. 32:861.

[7] We note that *Robinson* has been clarified; however, it is a portion of the holding that does not directly apply to the instant case. *See Arizona v. Gant*, U.S. , 129 S.Ct. 1710, 1713, 173 L. Ed. 2d 485 (2009). In Gant, the Supreme Court held that police officers may not conduct an unwarranted search of the passenger compartment of a vehicle unless "it is reasonable to believe that the arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense of arrest." *Id.* at 1713.

[8] In a dissenting opinion, Justice O'Connor believed that, as a result of the majority opinion in Atwater, 532 U.S. 318, the Fourth Amendment would allow a police officer to arrest and search a driver if the officer has probable cause to believe that a traffic violation has occurred. 532 U.S. at 372 (O'Connor, J., dissenting) (citations omitted).

7/30/09

CIVIL ACTION NO: 08-4712 SECTION: J(2)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

SHAWN M. LOCKETT ET AL

VERSUS

NEW ORLEANS CITY ET AL

ORDER AND REASONS[1]

Before the Court is Plaintiff Shawn Lockett ("Lockett") and Melanie Lockett's ("Mrs. Lockett") (collectively "Plaintiffs") Motion for New Trial (Rec. Doc. 84), seeking an order vacating the Court's Judgment dismissing Plaintiffs' claims against the State Defendants and the City Defendants with prejudice (Rec. Doc. 83), based on alleged manifest errors of law and fact. The Court has reviewed the motion, the record, and the memoranda of counsel, and now finds that Plaintiffs' motion should be denied for the reasons that follow.

As both the Court and the parties are intimately familiar with the facts of this case, the Court adopts for purposes of the present ruling its summary of the facts and procedural history of this matter as set forth in prior orders (Rec. Docs. 81 and 82).

THE PARTIES' ARGUMENTS

Initially, Plaintiffs allege that the Court's conclusion that the State Defendants had sufficient probable cause to support an arrest for the offense of careless driving is incorrect as a matter of law. Plaintiffs contend that the Louisiana decisions cited by the Court in fact do nothing more than support their argument that probable cause for a traffic stop is separate and distinct from the probable cause necessary to affect an arrest when the initial probable cause for the stop does not support an arrest. In any event, Plaintiffs also argue that, even if careless driving were an arrestable offense, the Court applied the incorrect standard in determining that probable cause existed based on Bieber and Arceneaux's testimony. Specifically, Plaintiffs argue that the facts and circumstances within the officers' knowledge at the time of the stop did not give rise to probable cause for an arrest. Rather, Bieber and Arceneaux both testified that they only intended to warn Lockett when they initiated the stop. As such, Plaintiffs argue that the Court improperly concluded that Bieber and Arceneaux had probable cause to arrest Lockett for careless driving at the time they stopped him, despite the alleged fact that the decision to arrest was not made until after Lockett called 911. In sum, Plaintiffs' assert that the Court "erroneously reasoned that because careless driving is an arrestable offense, whether or not the arresting officers were aware of this fact, the arresting officers had probable cause for the arrest," and as such improperly concluded that the State Defendants and Fletcher had proper probable cause to arrest Lockett. Rec. Doc. 84, p.6

Additionally, Plaintiffs argue that the Court improperly ignored evidence of malice and made credibility determinations that are improper on a summary judgment review. Plaintiffs note that Lockett submitted evidence - specifically the recording of his 911 call and Mrs. Lockett's hand-written notes taken at the scene - which indicates that the initial basis for the stop was solely speeding, and only after his 911 call regarding race discrimination were other traffic violations mentioned. Plaintiffs argue that this evidence, and the credibility issues implicated by the evidence, render summary judgment improper.

Next, Plaintiffs contend that the Court improperly accepted Ahner's testimony that he read Lockett his Miranda rights immediately when he placed Lockett in the MP vehicle, despite Lockett's testimony that he was only read his rights after an hour of detention. Plaintiffs contend that this mistake in fact precludes summary judgment.

Likewise, Plaintiffs contend that the Court improperly accepted Arceneaux's post hoc testimony that the area in which Lockett was stopped was relatively busy with prevalent youth pedestrian traffic. Plaintiffs assert that this description of the area is "easily rebuttable upon sight," and further point out that Fletcher's testimony does not indicate that Arceneaux even mentioned any risk of danger posed by Lockett's driving. Plaintiffs contend that this constitutes a mistake of fact requiring entry of an order vacating the Court's judgment.

Next, Plaintiffs note that the Court's June 26, 2009 Order and Reasons indicated that Plaintiffs presented neither a transcript nor audio of the incident recall log beginning with Bieber's call regarding the stop and continuing through to Lockett's booking. Further, Plaintiffs point out that the Court concluded that the only summary judgment evidence in the record indicated that Bieber's call was at 9:13:32 and that Lockett's 911 call was at 9:13 a.m. as well. Plaintiffs argue that they did in fact submit a recording of both the 911 call and the radio transmissions, as well as a transcript of both, in support of Lockett's contention that his arrest was in retaliation for his 911 call regarding discrimination. Plaintiffs contend that this mistake of fact is relevant to Lockett's claims of discrimination, and requires that the Court's Judgment be withdrawn.

Additionally, Plaintiffs argue that the Court erred in concluding that Lockett's seizure /detention was not unreasonable in length due to the fact that Lockett himself involved the NOPD. Plaintiffs note that Ahner himself requested the presence of NOPD officers, and thus Lockett alone was not responsible for involving the NOPD. Furthermore, Plaintiffs allege that the Court improperly ignored evidence that the State Defendants huddled together during Lockett's detention for the alleged purpose of determining whether to arrest him. Plaintiffs contend that this evidence should have precluded summary judgment of their civil rights conspiracy claims under 18 U.S.C. § 1985(3).

Plaintiffs also contend that the Court incorrectly ruled that Lockett did not allege or argue any injuries arising from the allegedly unreasonable searches of his person, despite the fact that he did allege claims of loss of reputation, humiliation, embarrassment, and pain and suffering.

Finally, Plaintiffs argue that the Court relied on a misquotation of Bieber's statement to Lockett in granting the various motions for summary judgment. Specifically, the Court indicated that Bieber told Lockett he needed to be **"at"** SUMO, whereas Lockett alleged that Bieber said he needed to **"go to"** SUMO. Plaintiffs note that "[t]he verbs to 'be' and 'go' are not synonyms," and suggest that the Court's "mistake" lends itself to the Court's rationale that Bieber's statement was merely a comment on Lockett's tardiness, as opposed to Lockett's contention that Bieber's explanation of his statement was merely an attempt to justify a racist remark.

In response, the City Defendants note that Plaintiffs have filed their present motion improperly under Rule 59 (a) (2) as a motion for new trial, when it should have been filed as motion to alter or amend judgment under Rule 59 (e). In any event, the City Defendants note the high standard for relief under Rule 59(e) - namely the requirement that the motion point out manifest error of law or fact, an intervening change in the law, newly discovered evidence, or some other manifest injustice - and contend that Plaintiffs have not met that burden. With that procedural argument, the City Defendants go on to adopt the arguments of the State Defendants in opposition to Plaintiffs' motion.

For their part, the State Defendants note that - regardless of the Court's discussion of whether or not probable cause existed for a careless driving arrest - the Court specifically concluded and based its ruling on the fact that probable cause existed for a reckless driving offense. As such, the State Defendants argue that Plaintiffs' focus on the issue of whether the Court properly analyzed the careless driving issue is irrelevant in light of its clear holing that probable cause existed for a reckless driving arrest. In any event, the State Defendants argue that Bieber and Arceneaux's subjective intent is irrelevant on the issue of probable cause, and thus the Court's Judgment should stand.

The State Defendants also refute Plaintiffs claims that Bieber and Arceneux did not have probable cause to arrest Lockett for reckless driving by pointing to Mrs. Lockett's own handwritten notes, which indicate that Fletcher actually stated that Lockett was speeding in an area with schools and day care facilities. Rec. Doc. 51, Ex. E, p.2. The State Defendants reiterate that Lockett is not on trial for a reckless driving offense - rather, the sole issue is whether the officers involved in his arrest had probable cause in light of all the circumstances to arrest him for reckless driving. As such, the State Defendants argue that even if Bieber and Arceneaux initially intended only to warn Lockett, such subjective intent does not negate the existence of probable cause for an arrest based on reckless driving. As such, the State Defendants argue that Plaintiffs' motion should be denied.

Next, the State Defendants refute Plaintiffs' argument that issues of credibility should have precluded summary judgment. The State Defendants note that Deville v. Maracantal, 567 F.3d 156, 165 (5th Cir. 2009) - which the Plaintiffs rely on for their credibility argument - involved officers with a history of improper arrests. However, there is no evidence whatsoever that any of the officers in this case have any such history. Further, the State Defendants note that Plaintiffs' arguments regarding retaliation and malice are based on their own self-serving statements, which were properly disregarded on summary judgment review.

The State Defendants also rebut Plaintiffs numerous arguments regarding alleged material mistakes of fact in the Court's prior rulings. First, with respect to the timing of Lockett's mirandizing, the State Defendants note that the alleged "mistake" cited by the Plaintiffs appears in the "Procedural History and Background Facts" section of the Court's June 26, 2009 order, which was only intended to provide an overall view of the case. However, the State Defendants note that in the Court's actual analysis, the timing of Lockett's mirandizing was properly held to be irrelevant to the constitutionality of the searches and seizure as a matter of qualified immunity. Next, the State Defendants argue that the Court did not improperly adopt Arceneaux's testimony - which was itself bolstered by Fletcher's similar testimony - that the area in which Lockett was stopped was busy.

Third, the State Defendants contend that there is no evidence to suggest that Bieber's reporting of the stop to his headquarters occurred after Lockett's 911 call. The State Defendants note that both the police radio transmissions and Lockett's 911 call are included on a single tape. The fact that Lockett's 911 call precedes the radio transmissions on the tape does not indicate that the call preceded those transmissions, but merely indicates that they were reproduced in that order. Furthermore, and regardless of the technicalities of the taping mechanism, the State Defendants argue that Plaintiffs' contention that the radio transmission of the stop occurred only after Lockett's 911 call is inconsistent with police procedure, which requires that officers call in the license plate of vehicles prior to a stop as a safety precaution. Both Bieber and Arceneaux testified that they followed this procedure in the instant case, and the transcript of the radio transmission further bears this out. Specifically, Bieber states in the transcript of the radio transmission that "it is going to be a Black Chevy Avalanche" and then gives Lockett's license plate numbers. Rec. Doc. 51, Ex. E. The State Defendants argue that the phrase "it is going to be" clearly indicates that the stop had not yet occurred. Thus, there is no evidence that Lockett's 911 call preceded the radio transmission to headquarters. In any event, even if Lockett's call did precede the radio transmission, this has no effect on the State Defendants' entitlement to qualified immunity.

Next, the State Defendants argue that the Court properly concluded that Lockett's own involvement of the NOPD extended the length of the stop. Only after Lockett's 911 call did Bieber and Arceneaux call their own supervisor Ahner, who then in turn called Fletcher of the NOPD. Thus, regardless of whether the NOPD was responding based on Lockett's call or Ahner's call to Fletcher, the State Defendants argue that Lockett's call was the basis for their responding, and further assert that it is illogical to think that Lockett would have left the scene after he himself called the NOPD.

The State Defendants also argue that there is no evidence not even in Lockett's own testimony of their "huddling together" during Lockett's detention, and even if there was, such huddling would not constitute adequate proof of a conspiracy. As such, the State Defendants argue that the Court properly dismissed Plaintiffs' § 1985(3) claims.

As for Plaintiffs' contention that Lockett did allege injuries based on various searches, the State Defendants note that Lockett' s own testimony that the search performed by Bieber was "standard" and that the one performed by Ahner was "appropriate[]" belie any such argument. In any event, the existence vel non of injuries does not affect the State Defendants entitlement to qualified immunity.

Finally, the State Defendants argue that "Plaintiffs' attempt to make an issue out of verb usage" regarding Bieber's statement to Lockett is complicated by the fact that Lockett himself does not even know what verb Bieber actually used, citing divergent versions of the statement throughout Plaintiffs' Complaint and Lockett's testimony. In any event, the State Defendants note that the Court specifically refused to adopt any ,'Ncorrect" version of the statement given the differing versions in the record, but concluded regardless that none of the differing versions evidenced any facially discriminatory animus. As such, the State Defendants argue that Plaintiffs' argument on this point is a red herring.

DISCUSSION

As an initial matter, the Court notes that Plaintiffs' motion, insofar as it seeks a "new trial" under Rule 59(a), is improper and should be considered as a motion under Rule 59(e). See Harcon Barge Co. v. D & G Boat Rentals, Inc., 784 F.2d 665, 669-70(5th Cir.198 6)("' [A]ny motion that draws into question the correctness of a judgment is functionally a motion under Civil Rule 59(e), whatever its label.' " (quoting 9 Moore's Federal Practice Par. 204.12[1], at 4-67 (1985))). A motion under "must be filed no later than 10 days after the entry " and as such Plaintiff's motion is timely under Rule 59 (e) of the judgment, Rule 59(e).

The Federal Rules of Civil Procedure motions do not expressly allow for reconsideration of an order. Bass v. U.S. Dept. 211 F. 3d 959, 962 (5th Cir. 2000). If such a motion is filed within 10 days it is considered under the standards of a Rule 59(e) Motion to Alter or Amend Judgment. Tex. A&M Research Found. v. Magna Transp., Inc., 338 F. 3d 394, 401 (5th Cir. 2003). The Fifth Circuit has described the scope and nature of a Rule 59(e) motion as follows:

> A Rule 59 (e) motion 'calls into question the correctness of a judgment.' [The Fifth Circuit Court of Appeals] has held that such a motion is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of judgment. Rather, Rule 59 (e) 'serve[s] the narrow purpose of allowing a party to correct manifest errors of law or fact or to present newly discovered evidence.' Reconsideration of a judgment after its entry is an extraordinary remedy that should be used sparingly.

Templet v. HydroChem Inc., 367 F.3d 473, 478-79 (5th Cir. 2004) (citations omitted).

Under the applicable Rule 59(e) standards, the Court finds that Plaintiffs' motion should be denied, as they have not presented any manifest errors of law or fact that call into question the correctness of the Court's judgment.

First of all, with respect to Plaintiffs' arguments regarding the Court's allegedly improper application of Louisiana cases regarding whether careless driving is an arrestable offense, the Court notes as an initial matter that its discussion of whether Bieber and Arceneaux had probable cause to arrest Lockett for careless operation was merely an alternative basis for concluding that probable cause existed for Lockett's arrest. In fact, the Court specifically held that probable cause existed to support Lockett' s arrest for reckless driving - the offense for which he was eventually arrested. Thus, to the extent, Plaintiffs rely on the Court's merely alternative point of interest, such a slim reed cannot support their heavy Rule 59(e) burden. In any event, the Court also notes that the Supreme Court has held that "[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence," - even as minor as a seat belt violation - "he may, without violating the Fourth Amendment, arrest the offender." Atwater v. City of Laao Vista, 532 U.S. 318, 354 (2001) . Based on Atwater, even if the only justification for Lockett's arrest were a reckless driving offense, his arrest would still have been supported by probable cause, as Bieber and Arceneaux both testified that they witnessed Lockett commit various traffic violations. As such, Plaintiffs have not presented any error of law or fact that vitiates the Court's judgment, and their Rule 59(e) motion should be denied.

As for Plaintiffs' allegations that the Court relied on mistakes of fact, the Court finds that the record belies these allegations. First, as to the alleged mistake regarding the timing of Lockett's mirandizing, the Court notes that no issue of timing was presented or argued in the context of the summary judgment motions that this Court granted in advance of the final judgment in this case. Thus, to the extent that Plaintiffs attempt in this Rule 59(e) motion to present some new argument based on the timing of Lockett's mirandizing, such arguments are improper and should be rejected. Next, Plaintiffs' argument that the Court mistakenly adopted Arceneaux's testimony regarding the nature of the area in which Lockett was stopped is simply wrong. Arceneaux's testimony regarding the nature of the area went unrefuted on the summary judgment record before the Court, and thus there was no question of material fact on the relevant record as to the nature of the area where Lockett was stopped. Furthermore, as noted by the State Defendants, Mrs. Lockett' s own handwritten notes from the day of Lockett's arrest indicate that Fletcher actually stated that Lockett was speeding in an area with schools and day care facilities. As such, the Court did not rely on any mistaken facts in this regard.

Third, Plaintiffs suggest that the Court mistakenly indicated that they failed to present either a transcript or audio recording of the radio transmissions by the State Defendants and Lockett's 911 call, despite the fact that a copy of the audio was hand-delivered to the Court and a transcript was entered in the record. First of all, the Court notes that an audio CD was delivered and reviewed in its entirety by the Court; however, that audio CD only included a recording of Lockett's 911 call and did not include any audio of the radio transmissions between the State Defendants and headquarters. Thus, to the extent Plaintiffs' suggest that the Court mistakenly failed to listen to the audio delivered to the Court, it was in fact Plaintiffs who mistakenly failed to present the full audio of the radio transmissions for the Court's review. Further, while the Court acknowledges that an alleged transcript of the radio transmissions was included as an exhibit to Plaintiff's opposition to the State Defendants' Motion for Summary Judgment (Rec. Doc. 51, Ex. E), it should be noted that the alleged transcript is merely an untitled, unsigned, completely unverified "typed-out" version of what Plaintiffs allege to have constituted the radio transmissions between the State Defendants and headquarters. Given that the Court had no audio with which to compare this completely unauthenticated document, the Court refused to consider the transcript. In any event, and regardless of these logistical issues, the Court agrees with the State Defendants - who rely on the Plaintiffs own purported transcript for their argument and thus presumably acknowledge its validity to that extent - that Bieber's initial radio transmission regarding the stop of Lockett's vehicle preceded Lockett's 911 call. Furthermore, although the Court did note the issue of the timing of the 911 call in various footnotes, the Court's broader analysis of the propriety of Lockett's arrest rendered the issue of the timing of the call irrelevant. As such, Plaintiff's motion should be denied on this ground as well.

Likewise, the Court rejects Plaintiffs' contention that the Court mistakenly assumed that Lockett's own involvement of the NOPD lengthened his detention. The Court's conclusion on this point was not based on any assumption, but on the undisputed deposition testimony of Bieber, Ahner, and Arceneaux that Lockett's involvement of the NOPD and his escalation of the incident required their continued presence at the scene. Furthermore, the Court dismisses Plaintiffs' conclusory allegation that the Court somehow mistakenly rejected evidence that the State Defendants huddled together, and that this somehow invalidates the Court's dismissal of their § 1985(3) claims. Likewise, the Court finds that Plaintiffs' have not met their Rule 59(e) burden of showing that the Court incorrectly concluded that Lockett did not allege or argue injuries from the allegedly unreasonable searches.

Finally, the Court finds Plaintiffs' syntactical and semantic argument that the Court mistakenly relied on a misquotation of Bieber's statement to Lockett somewhat surprising in light of the fact that the Court specifically declined to "make any determination as to which version of Bieber's statement is the most accurate," and further noted that "in the end the true version of the statement may never be established." Rec. Doc. 81, p. 71. This statement reveals that Plaintiffs' argument is simply factually wrong, as the Court did not rely on any single version of the statement, misquoted or otherwise. In fact, the Court concluded that regardless of what version of the statement - among the several included in the summary judgment record - might be correct, none of the versions indicated any racial animus on their face. Thus, Plaintiff's Rule 59(e) motion should be denied on this ground as well. Accordingly,

IT IS ORDERED that Plaintiffs' Motion for New Trial (Rec. Doc. 84), insofar as it seeks relief under Rule 59(e), is hereby DENIED.

IT IS FURTHER ORDERED in light of the above ruling that the oral argument requested on Plaintiffs' motion is hereby CANCELLED.

New Orleans, Louisiana, this 30th day of July 30th, 2009.

CARL J. BARBIER
UNITED STATE7S DISTRICT JUDGE

Footnote

1The abbreviations utilized in the Court's related orders in this case (Rec. Docs. 81 & 82) will also be used in discussing the present motion. Specifically, the national guardsmen Christopher Ahner, Brandt Arceneaux, and Jonathan Bieber will be referred to collectively as "the MP Defendants." Additionally, Governor Jindal, SUMO officer Joseph Thomas, and the MP Defendants will be referred to collectively as "the State Defendants."

7/7/09

CIVIL ACTION NO: 08-4712 SECTION: J(2)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

SHAWN M. LOCKETT ET AL

VERSUS

NEW ORLEANS CITY ET AL

JUDGMENT

Considering the court's Orders and Reasons dated June 26, 2009 and June 30, 2009, filed herein,

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, City of New Orleans, Clarence Ray Nagin, Warren Riley, Lynn Fletcher, Reginald Gains, Tocka Clark, and against plaintiffs, Shawn M. Lockett and Melanie C. Lockett, dismissing the plaintiffs' suit with prejudice, at plaintiffs' cost.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, Piyush Jindal, Christopher Ahner, Jonathan Bieber, Brandt Arceneaux, and Joseph Thomas, and against plaintiffs, Shawn M. Lockett and Melanie C. Lockett, dismissing the plaintiffs' suit without prejudice and at plaintiffs' cost, insofar as it asserts damage claims against these defendants in their official capacities.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants Christopher Ahner, Jonathan Bieber, Brandt Arceneaux, and Joseph Thomas, and against plaintiffs, Shawn M. Lockett and Melanie C. Lockett, dismissing the plaintiffs' suit with prejudice and at plaintiffs' cost, insofar as it asserts claims against these defendants in their individual capacities.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendant, Piyush Jindal, in his official capacity, and against plaintiffs, Shawn M. Lockett and Melanie C. Lockett, dismissing the plaintiffs' suit with prejudice, insofar as it seeks injunctive relief against Piyush Jindal in his official capacity.

New Orleans, Louisiana, this 7th day of JULY, 2009.
CIVIL ACTION NO: 08-4712 SECTION: J(2) (#82)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

SHAWN M. LOCKETT ET AL

VERSUS

NEW ORLEANS CITY ET AL

June 30, 2009, Decided

June 30, 2009, Filed

CARL J. BARBIER, UNITED STATES DISTRICT JUDGE.

ORDER AND REASONS[1]

Before the Court is the **Motion to Dismiss Plaintiffs' Complaint Pursuant to F.R.C.P. 12(c) or, Alternatively, for Summary Judgment Pursuant to FRCP 56 (Rec. Doc. 57)**, filed by Mayor C. Ray Nagin ("Nagin") in his official capacity as Mayor of New Orleans; Warren J. Riley ("Riley") in his official capacity as Superintendent of the New Orleans Police Department ("NOPD"); NOPD Lieutenant Lynn Fletcher ("Fletcher"), as well as NOPD officers Toka Clark ("Clark") and Reginald Gaines ("Gaines"), collectively "the NOPD Defendants." These various defendants will be referred to collectively as "the City Defendants." This motion seeks dismissal of (1) Plaintiff's claims under § 1983 against the NOPD Defendants for false arrest, excessive use of force, and unreasonable search and seizure (2) Plaintiffs' claims against Fletcher under 42 U.S.C. § 1985, and against

Fletcher, Gaines, and Clark under 42 U.S.C. § 1986; (3) Mrs. Lockett's claims for intentional infliction of emotional distress under Louisiana Civil Code Article 2315.6; (4) Lockett's state law claims against Fletcher, Gaines, and Clark for intentional infliction of emotional distress, loss of reputation, humiliation, embarrassment, and negligence; (5) Plaintiffs' claims against Nagin and Riley under 42 U.S.C. § 1983 for institution of a policy of inadequate training for and resulting constitutional violations by national guardsmen participating in Task Force Gator; (6) Plaintiffs' claims against Nagin and Riley for prospective injunctive relief.

PROCEDURAL HISTORY AND BACKGROUND FACTS

The Court has provided an exhaustive summary of the factual circumstances of this case in its ruling (Rec. Doc. 81) on the State Defendants' Motion to Dismiss and Motion for Summary Judgment. As such, the Court will not rehash those same facts in addressing the present motion, and incorporates its prior summary of the facts *in extenso*.

THE PARTIES' ARGUMENTS

As an initial matter, the City Defendants contend that Plaintiffs' claims must be dismissed as inadequate on the face of their pleadings under Rule 12(c). Additionally, and in the alternative, the City Defendants contend that Plaintiffs have not met their burden on the present summary judgment record of presenting specific evidence to refute the qualified immunity defense invoked by the City Defendants.

As such, the City Defendants incorporate by reference the section entitled "Qualified Immunity" from the State Defendants' Motion for Summary Judgment (Rec. Doc. 48) in support of their own motion for summary judgment on qualified immunity grounds as to Lockett's federal and state law false arrest claims. In addition to the arguments set forth in that adopted pleading, the City Defendants argue that Lockett's false arrest claims fail as a matter of law because, even if there were no probable cause to arrest him for reckless driving - which the City Defendants deny - probable cause existed for other arrestable offenses - namely careless operation, failure to have proof of insurance, disregarding traffic signals, and illegal and reckless lane changing, amongst others. Finally, Fletcher individually asserts that any false arrest claims against him are barred as a matter of law, as he relied on probable cause supplied by the MP Defendants.

The City Defendants also contend that, because Lockett pled guilty to and paid a fine for a lesser charge in connection with the arrest, he is barred from bringing any civil suit for false arrest because his guilty plea is conclusive proof of probable cause. See *Heck v. Humphrey*, 512 U.S. 477, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994); *Gibson v. State*, 758 So. 2d 782, 788 (La. 2000).

Finally, Fletcher individually argues under the Fifth Circuit's "collective knowledge doctrine" regarding probable cause for arrest - which essentially allows an officer who arrests based on probable cause supplied by another officer's information to invoke qualified immunity - that he is entitled to qualified immunity as to Lockett's false arrest claims. See *United States v. Webster*, 750 F.2d 307, 323 (5th Cir. 1984). The collective knowledge doctrine applies as long as "it [is] objectively reasonable for [the arresting officer] to believe, on the basis of the statements [of another officer], that probable cause for the arrest existed." *Deville v. Marcantel*, 567 F.3d 156, 2009 WL 1162586, *6 (5th Cir. 2009).

Next, the City Defendants adopt *in toto* the arguments presented in the State Defendants' motion for summary judgment [2] as to Plaintiffs' claims under 42 U.S.C. §§ 1985 and 1986. [3]

As for Lockett's state law claims, the City Defendants argue that these fail as well given the existence of probable cause to arrest Lockett.

The City Defendants also adopt the State Defendants arguments for summary judgment [4] as to Mrs. Lockett's claims for intentional infliction of emotional distress under Article 2315.6 of the Louisiana Civil Code. Likewise, the City Defendants argue that Lockett has no independent claim for emotional distress under Louisiana law, and thus, because his false arrest claims fail, his claim for emotional distress damages should also be dismissed. In addition, and in the alternative, even assuming that Lockett could state a separate cause of action for emotional distress, he has not met the heavy burden of proving such damages. See *White v. Monsanto*, 585 So. 2d 1205 (La. 1991).

Finally, as to the claims against Nagin and Riley, the City Defendants argue that since Lockett's constitutional tort claims fail, the Court need not reach the question of whether a City policy caused any such torts. As such, the City Defendants argue that Plaintiffs' § 1983 claims against Nagin and Riley for municipal liability under *Monell v. Dept. of Soc. Services*, 436 U.S. 658, 694, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), fail along with his constitutional tort claims. Further, even if the Monell claim were factually supportable, the City Defendants argue that Plaintiffs have not made any showing that an official policy or custom inflicted the constitutional torts alleged by Lockett. *See Monell*, 436 U.S. at 694. Additionally, the City Defendants note that isolated unconstitutional acts of municipal employees will almost never trigger liability. *Piotrowski v. City of Houston*, 237 F.3d 567, 578 (5th Cir. 2001).

In opposition, Plaintiffs first and foremost argue that "it is preposterous to even suggest that probable cause existed" to arrest Lockett in light of Lockett's claims that he was retaliated against for his claims of racial discrimination. Additionally, Plaintiffs contend that material issues of fact exist regarding whether and to what extent Fletcher was aware of Lockett's discrimination claims during the events of this case. Specifically, despite the fact that he appeared on the scene in response to Lockett's 911 call and Ahner's radio request, Fletcher claims he did not know about and did not investigate Lockett's discrimination claims, notwithstanding the fact that he communicated with both Lockett and the MP Defendants for over thirty minutes prior to Lockett's eventual arrest. As such, Plaintiffs argue that this question of fact remains regarding whether Fletcher and the other NOPD Defendants acted with malice in the alleged violations of Lockett's constitutional rights.

Next, Plaintiffs generally contend that the City Defendants' motion, insofar as it proceeds under Rule 12(c), should be denied, as their pleadings adequately assert the causes of action at issue. Accordingly, the bulk of Plaintiffs' opposition addresses the City Defendants' arguments for summary judgment.

Plaintiffs state that on his arrival at the scene, Fletcher had a duty to investigate Lockett's complaint and to determine whether probable cause existed for his arrest. Specifically, Plaintiffs point out the testimony of Bieber and Arceneaux that they only intended to warn Lockett, and thus argue that no probable cause existed to support the arrest. Further, Plaintiffs note that when Fletcher arrived, Lockett was already handcuffed, but Fletcher never asked why, and further did not inquire as to whether or how many times Lockett was frisked or whether he had been mirandized. Finally, Plaintiffs contend that Gaines and Clark had no personal knowledge of any conduct by Lockett meriting any law enforcement action, and did not make any personal investigation into the situation. As such, Plaintiffs argue that the NOPD Defendants breached their duty to investigate alleged unconstitutional actions by fellow officers.

With this background, Plaintiffs re-adopt their arguments in opposition to the State Defendants qualified immunity arguments, and further contend that material issues of fact exist regarding the City Defendants entitlement to qualified immunity. In sum, Plaintiffs argue that there is a missing link in the probable cause chain between the initial purpose of the stop - which Bieber and Arceneaux both testified was to issue a warning for careless driving - and the eventual grounds for arrest on charges of reckless driving. Based on this incomplete picture, Plaintiffs argue that there is a question of fact regarding whether Fletcher had probable cause to arrest Lockett. As further evidence of this fact issue, Plaintiffs note that Article 213 of the Louisiana Code of Criminal Procedure requires that officers who have witnessed a misdemeanor effect an immediate arrest. La. Code Crim. Proc. art. 213. Plaintiffs point out that Fletcher arrived on the scene at approximately 9:29 a.m., but Lockett was not actually taken from the scene until 10:11 a.m. Based on this chronology, as well as Fletcher's admission to Lockett that they were deciding whether to arrest him, Plaintiffs contend that Fletcher lacked probable cause to make an arrest in compliance with Article 213.

Additionally, Plaintiffs contend that the City Defendants' reliance on the Heck doctrine is misplaced. Plaintiffs argue that because Lockett pled guilty to a non-moving, non-arrestable offense, Heck is completely irrelevant. Likewise, Plaintiffs argue that the "myriad" of other offenses for which the City Defendants argue Lockett could have been arrested are actually *non-arrestable offenses*. Finally, Plaintiffs argue that Fletcher could not have reasonably relied on the probable cause to arrest for reckless driving allegedly supplied by Arceneaux and Bieber because they themselves did not have probable cause, and admitted as much when they testified that they only intended to give Lockett a warning.

Next, in light of the City Defendants' adoption of the State Defendants' arguments for summary judgment as to Plaintiffs' §§ 1985 and 1986 claims, the Plaintiffs adopt their opposition to the State Defendants motion. As for their state law claims, Plaintiffs reiterate their argument that the NOPD Defendants lacked probable cause to arrest Lockett. As such, Plaintiffs argue that Lockett's claims of false arrest and concomitant emotional distress cannot be dismissed on summary judgment. Next, Plaintiffs argue, adopting their briefing in opposition to the State Defendants' motion, that Mrs. Lockett has sufficiently stated a cause of action for intentional infliction of emotional distress under the Louisiana Supreme Court's holding in Lejeune as well as Article 2315.6. In addition, Lockett argues that he has stated a claim for intentional and negligent infliction of emotional distress, which manifested itself in increased anxiety and depression, as well as a drastic drop in grades during his first year in law school as compared with his record at SUNO as an undergraduate.

Finally, Plaintiffs claim that they have asserted viable Monell claims against Nagin and Riley.

DISCUSSION

As an initial matter, the Court finds that the City Defendants arguments under Rule 12(c) are unavailing, and as such will only consider their arguments for summary judgment. The Court will address each of Plaintiff's claims, and the City Defendants' various grounds for summary judgment as to those claims, in order.

(1) False Arrest Claims under § 1983 and Louisiana Law [5]

Lockett asserts claims under § 1983 as well as Louisiana law for false arrest against the NOPD Defendants. However, as the Court has previously determined (See Rec. Doc. 81), and despite Plaintiffs' contention that a finding of probable cause would be "preposterous," the MP Defendants did in fact have probable cause to arrest Lockett, either for reckless driving or the arrestable offense of careless driving.

To the extent Plaintiffs argue that the "myriad" of other arrestable offenses noted by the City Defendants were actually non-arrestable offenses, they are simply wrong in their contention that careless driving is not an arrestable offense. Louisiana courts have held that even the offense of "careless driving," which both Bieber and Arceneaux testified was a proper characterization of Lockett's traffic violations, constitutes an arrestable offense. See *State v. Short*, 839 So.2d 173 (La. App. 4 Cir. 2003). Based on the MP Defendants adequate probable cause for arresting Lockett, the NOPD Defendants reasonably relied on that probable cause in eventually effecting Lockett's arrest. "[W]here a police officer makes an arrest on the basis of oral statements by fellow officers, an officer will be entitled to qualified immunity from liability in a civil rights suit for unlawful arrest provided it was objectively reasonable for him to believe, on the basis of the statements, that probable cause for the arrest existed." *Deville v. Marcantel*, 567 F.3d 156, 2009 WL 1162586 (5th Cir. 2009) (citing *Rogers v. Powell*, 120 F.3d 446, 455 (3d Cir.1997)). The Deville court found that an arresting officer was entitled to qualified immunity for false arrest claims based on the fact that "the uncontroverted evidence show[ed] that [another officer] communicated the reason for the stop to [the arresting officer], specifically relaying that [the plaintiff] had been speeding and refused to sign the traffic ticket . . . [and the fact that] there was no evidence that [the arresting officer] had a reason to disbelieve [the informing officer's] account at the time of the . . . arrest." *Id.*

Similarly, in this case, the evidence, while not necessarily uncontroverted, reveals that Bieber and Arceneaux informed Fletcher, who along with Gaines and Clark effected the actual arrest, that Lockett had run a red light and a stop sign, and had been speeding, all of which in their opinion supported probable cause for the violation of reckless driving. In the end, even "if officers of reasonable competence could disagree on whether or not there was probable cause to arrest a defendant, immunity should be recognized." *Gibson v. Rich*, 44 F.3d 274, 277 (5th Cir.1995). Accordingly, the NOPD Defendants properly relied on the probable cause statements of Bieber and Arceneaux in effecting Lockett's arrest. Furthermore, there is no evidence to suggest that the NOPD Defendants had any reason to disbelieve Bieber and Arceneaux's account at the time of Lockett's arrest.

Lockett argues that Fletcher had reason to disbelieve the MP Defendants in light of Lockett's claims of racial discrimination, and in light of Fletcher's failure to investigate those claims. However, this argument is belied by the record. First, Fletcher testified that he was never informed at any point over the course of the events leading up to the arrest that Lockett had made any complaint regarding racial discrimination. Second, although Lockett testified generally that he did inform Fletcher about the allegedly racial comments made by

Bieber, he did not give any specific testimony regarding what he told Fletcher about those comments. As such, on the present record, the Court finds that there is no question of fact as to whether Fletcher had probable cause based on Bieber and Arceneaux's statements to arrest Lockett. Accordingly, Lockett's federal and state law false arrest claims against Fletcher and the other NOPD Defendants fail as a matter of law.

Based on this analysis, the City Defendants' reliance on the Heck doctrine is moot, and thus the Court will not address those arguments.

2) Plaintiffs' Claims under §§ 1985 & 1986 [6]

As the City Defendants have adopted the State Defendants' arguments in support of summary judgment regarding Plaintiffs' claims under §§ 1985 and 1986, and as Plaintiffs' have likewise adopted their opposition to the State Defendants' motion, the Court adopts the analysis and conclusion from its prior ruling on the State Defendants' motion (Rec. Doc. 81), which granted the State Defendants' motion for summary judgment with respect to those claims. As such, the City Defendants motion for summary judgment as to the claims against the NOPD Defendants under §§ 1985 and 1986 should be granted.

3) Mrs. Lockett's Claims under Article 2315.6 of the Louisiana Civil Code

The City Defendants have adopted the State Defendants arguments in support of summary judgment as to Mrs. Lockett's claims under Louisiana Civil Code Article 2315.6, and the Plaintiffs' have adopted their related opposition. Accordingly, for the same reasons provided by the Court in its ruling on the State Defendants motion (Rec. Doc. 81), the City Defendants' motion for summary judgment as to Mrs. Lockett's claims of bystander damages for intentional infliction of emotional distress under Article 2315.6 should be granted.

4) Lockett's Claims for Emotional Distress, Loss of Reputation, Humiliation, Embarrassment, and Negligence

As the Court has previously noted (See Rec. Doc. 81), Lockett's claims for intentional and/or negligent infliction of emotional distress require a showing that (1) that the conduct of the defendant was extreme and outrageous; (2) that the emotional distress suffered by the plaintiff was severe; and (3) that the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct. *White v. Monsanto Company*, 585 So.2d 1205, 1209 (La.1991). As it found with respect to the State Defendants, the Court likewise finds that there is no evidence in the present record to indicate that the conduct of the City Defendants was "extreme and outrageous" or that any of the City Defendants "desired to inflict emotional distress" or knew that such distress would occur in the circumstances. Thus, the City Defendants' motion for summary judgment as to Lockett's claims for emotional distress damages should be granted.

In addition, based on the failure of Lockett's substantive claims against the City Defendants, his damage claims for loss of reputation, humiliation, embarrassment, and negligence also fail.

5) Plaintiffs' Monell claims against Nagin and Riley

As an initial matter, Plaintiffs' claims against Nagin and Riley in their official capacities are effectively suits against the City of New Orleans as a municipality. See *Woodard v. Andrus*, 419 F.3d 348, 352 (5th Cir. 2005). As such, the standards for municipal liability established by the Supreme Court's decision in *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978), are applicable. A municipality is liable under § 1983 only if its "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Id.* at 694. The Fifth Circuit has noted several ways in which a plaintiff can establish that a policy or custom has inflicted a constitutional violation:

> The plaintiff can prove the existence of a municipal policy through, inter alia, the actions of the municipality's legislative body or an individual with final decision making authority. The plaintiff can also prove the existence of a municipal custom by pointing to a persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy.

Deville v. Marcantel, 567 F.3d 156, 2009 WL 1162586 (5th Cir. 2009) (internal citations and quotations omitted). Stated differently, "[f]or liability to attach, three elements must be proved: "(1) an official policy (or custom), of which (2) a policy maker can be charged with actual or constructive knowledge, and (3) a constitutional violation whose 'moving force' is that policy (or custom)." *Henry v. City Of Taylor, Tex.*, 2009 U.S. App. LEXIS 12877, 2009 WL 1616175, *1 (5th Cir. June 9, 2009) (citing *Pineda v. City of Houston*, 291 F.3d 325, 328 (5th Cir. 2002)). As such, a plaintiff must show "either a formal policy officially adopted and promulgated by city policymakers, or a well-settled and common practice by city officials or employees of which the city or its policymakers were actually or constructively aware." *Id.* Additionally, it is clear that a claim for municipal liability under § 1983 must be premised on an independent constitutional violation. See, e.g., id. and *Plemons v. Amos*, 306 Fed. Appx. 160, 163 (5th Cir. 2009).

Under Monell, Plaintiffs' claims for municipal liability against Nagin and Riley fail as a matter of law for several reasons. First, as the Court has noted at length above, Plaintiffs' have failed to show any constitutional violation on the part of the City Defendants. As such, Plaintiffs have not met the *sine qua non* requirement of a Monell claim - namely an underlying constitutional violation - that must exist even before any analysis of an alleged policy or custom. Furthermore, even if Plaintiffs had made a showing of a viable constitutional violation, they have failed to adequately support their allegations of any official policy or custom of which either Nagin or Riley can be charged with knowledge as policy maker. Moreover, given that Plaintiffs' municipal liability claims are based on failure to train allegations, their insufficient showing of a policy or custom likewise results in an insufficient showing of any deliberate indifference to constitutional rights by Nagin or Riley. In fact, the entirety of Plaintiffs' opposition to the City Defendants' motion to dismiss the Monell claims consists of a mere reassertion of the allegations in their complaint. As the Supreme Court has held, "Monell's rule that a city is not liable under § 1983 unless a municipal policy causes a constitutional deprivation will not be satisfied by merely alleging that the existing training program for a class of employees, such as police officers, represents a policy for which the city is responsible." *Harris*, 489 U.S. at 389. As such, the City Defendants' motion for summary judgment as to the Monell claims against Nagin and Riley should be granted.

6) Plaintiffs' Claims for Injunctive Relief

For the same reasons stated in the Court's ruling on the State Defendants' motion (Rec. Doc. 81), the claims for prospective injunctive relief against Nagin and Riley should be dismissed with prejudice under *City of Los Angeles v. Lyons*, 461 U.S. 95, 109, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983).

In sum, all Plaintiffs' claims against the City Defendants fail as a matter of law on the present record. Accordingly,

IT IS ORDERED that the City Defendants' **Motion to Dismiss Plaintiffs' Complaint Pursuant to F.R.C.P. 12(c) or, Alternatively, for Summary Judgment Pursuant to FRCP 56 (Rec. Doc. 57)** is hereby **GRANTED**, insofar as its seeks summary judgment of Plaintiffs' claims.

IT IS FURTHER ORDERED, in light of the above ruling, that all Plaintiffs' claims against the City Defendants are hereby **DISMISSED WITH PREJUDICE**.

New Orleans, Louisiana, this 30th day of June, 2009.

/s/ Carl J. Barbier

CARL J. BARBIER

UNITED STATES DISTRICT JUDGE

Footnotes

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1 The abbreviations utilized in the Court's related order in this case (Rec. Doc. 81) will also be used in discussing the present motion. Specifically, the national guardsmen Christopher Ahner, Brandt Arceneaux, and Jonathan Bieber will be referred to collectively as "the MP Defendants." Additionally, Governor Jindal, SUNO officer Joseph Thomas, and the MP Defendants will be referred to collectively as "the State Defendants."

2 See Rec. Doc. 48, Sections entitled "No Evidence to Support 42 U.S.C. § 1985 Claims," at pp. 15-18, and "Lockett's 42 U.S.C. § 1986 Claim Fails with his 42 U.S.C. § 1985 Claim," at pp. 18-19.

3 As the Court has previously noted, Plaintiffs have abandoned their claims under 42 U.S.C. § 1981, and thus the City Defendants opposition as to those claims is moot. Rec. Doc. 81, p. 24, n. 13.

4 See Rec. Doc. 48, Section entitled "Melanie Lockett

Fails to State a Claim Upon Which Relief Can be Granted," pp. 22-24.

5 The Court notes that Plaintiffs' complaint also asserts claims of excessive force and unreasonable search and seizure against the NOPD Defendants. Rec. Doc. 1, p. 13 at ¶ LVII. However, neither the City Defendants, nor Plaintiffs, have addressed these claims in the briefing on the present motion for summary judgment. However, the Court notes that none of the NOPD Defendants frisked or handcuffed Lockett until he was actually arrested and taken to central lockup. In fact, Lockett admitted at his deposition that he did not incur any physical injuries as the result of any actions of the NOPD Defendants. Likewise, Lockett essentially admitted that the only search conducted by the NOPD Defendants was reasonable. As such, Lockett has admitted that the only claims he is asserting against the NOPD Defendants had to do with the validity of his arrest. Accordingly, any excessive force or illegal search and seizure claims against the NOPD Defendants should be dismissed with prejudice.

6 As noted earlier, Plaintiffs have conceded in their opposition to the State Defendants' motion for summary judgment that they have not and cannot state a claim for relief under § 1981, and thus consent to the summary dismissal of their claim under that section.

CIVIL ACTION NO: 08-4712 SECTION: J(2)

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

SHAWN M. LOCKETT ET AL

VERSUS

NEW ORLEANS CITY ET AL

JUDGES: CARL J. BARBIER, UNITED STATES DISTRICT JUDGE.

OPINION BY: CARL J. BARBIER

OPINION

ORDER AND REASONS

Before the Court are the **Motion to Dismiss Pursuant to FRCP 12(b)(1) (Rec. Doc. 47)** filed by Piyush "Bobby" Jindal in his official capacity as Governor of Louisiana; Christopher Ahner, in his official capacity as Specialist in the Louisiana Air National Guard; Brandt Arceneaux, in his official capacity as Sergeant in the Louisiana Air National Guard; Jonathan Bieber, in his official capacity as Master Sergeant in the Louisiana Air National Guard; and Joseph Thomas, in his official capacity as a Southern University of New Orleans ("SUNO") campus police officer (collectively, "the State Defendants"). The National Guardsmen defendants will be referred to collectively as "the MP Defendants." Also before the Court is the **Motion for Summary Judgment(Rec. Doc. 48)** filed by the State Defendants.

These motions seek dismissal of Plaintiffs' claims under 42 U.S.C. §§ 1981, 1983, 1985, and 1986, and various state causes of action arising from Shawn M. Lockett's arrest on July 1, 2008.

PROCEDURAL HISTORY AND BACKGROUND FACTS

On July 1, 2008, Lockett was driving from his home in New Orleans East to a class at SUNO scheduled for 9:10 a.m. Bieber and Arceneaux were conducting a patrol near SUNO as members of the National Guard Task Force ("NGTF" or "Task Force Gator") assisting the New Orleans Police Department ("NOPD") with post-Katrina law enforcement in the city under order of Governor Jindal. From here, the parties' descriptions of the events preceding Lockett's arrest become diametrically opposed.

Shortly after 9:00 a.m., Bieber and Arceneaux saw Lockett traveling west on Hayne Boulevard at a speed faster than the flow of traffic. [1] Bieber and Arceneaux then began to follow Lockett, and allegedly witnessed him disregard a red traffic light at the intersection of Hayne and Downman Road, as well as a stop sign at the intersection of Downman and Leon C. Simon. Additionally, Arceneaux estimated Lockett's speed in excess of 45 miles per hour.

Contrary to Arceneaux and Bieber's assertions, Lockett claims that he stopped at the red light on Hayne and Downman, then executed a right turn onto Downman after checking for traffic. Afterwards, Lockett alleges that he came to a complete stop at the stop sign on Downman and Leon C. Simon, yielded to a truck that had reached the intersection before him, then proceeded left on Leon C. Simon and over the Seabrook Bridge. Once on the bridge, Lockett noticed lights on a law enforcement vehicle and, once he realized he was being pulled over, he turned onto SUNO's North Campus into the driveway shared by SUNO and the FBI Academy. According to the NOPD incident recall report, Bieber and Arceneaux radioed the traffic stop in to dispatch at 9:13:32 a.m. Thus, according to the State defendants, at the time of the traffic stop, Lockett was already late for class, which corroborates the allegations by Bieber and Arceneaux that he was speeding.

Lockett alleges, with the support of Bieber and Arceneaux's deposition testimony, that the initial intention during the traffic stop was to issue a warning to Lockett for his alleged traffic violations. See Bieber's Deposition Testimony, Rec. Doc. 51-3, Exhibit C, p. 67; Arceneaux's deposition testimony, Rec. Doc. 51-4, Exhibit D, pp. 123-24. In fact, Lockett notes Arceneaux's testimony that Lockett's alleged violations may have amounted to *careless* driving, not *reckless* driving. Rec. Doc. 51-4 at p.103.

Regardless, Bieber approached Lockett's vehicle and began to talk with Lockett. Lockett alleges that Bieber approached in an aggressive manner and asked him whether he knew how fast he had been driving. Lockett responded that he did not, but that he had been going with the flow of traffic. Bieber then allegedly asked Lockett in "a very agitated tone" where he was going, to which Lockett responded that he was going to class. Bieber then gestured toward the FBI building and asked Lockett how he would like it if he (Bieber) went in to talk to his instructor, apparently assuming that Lockett was a student at the FBI Academy. Lockett answered that he was going to class at SUNO, and Bieber responded "in a hostile and derogatory manner" that Lockett "need[ed] to go to SUNO." Rec. Doc. 51 at p. 5 (emphasis in original). Lockett, believing that this statement was "racially charged," [2] asked Bieber what he meant by that statement, to which Bieber responded by ordering Lockett out of his vehicle and asking him to provide his license, registration, and proof of insurance. Bieber also frisked Lockett at this point. [3] For his part, Bieber contends that after he made the allegedly "racially charged" statement to Lockett, which elicited Lockett's question regarding the statement's meaning, Bieber stepped away from the vehicle and called his supervisor Ahner.

Bieber denies that he made this statement as Lockett alleges, and further denies that his statement had any racial implication whatsoever. Specifically, Bieber explained his statement as follows:

> Q. What were the exact words?
>
> A. That if he had left his house sooner, he would be at SUNO already for his chemistry lab. That way he wouldn't have been speeding through the district, and saying that you need to be at SUNO meant if he had left his house sooner, then he would have already been at SUNO and we wouldn't be in the present situation that we were in.
>
> Q. Did you give him the full sentence that "if you left your house sooner and done this and did all

> these other things, you would be there already" or you just simply said "you need to be at SUNO?"
>
> A. Yes, sir. I gave him the full statement. The only thing that he's saying is just that I said "you need to be at SUNO" but I think that was omitted [sic] everything what [sic] I had said.

Rec. Doc. 51-3, p. 14.[4]

In the meantime, Arceneaux approached Lockett's vehicle to ask for his license, registration, and proof of insurance. As it turned out, Lockett's proof of insurance card was expired. Lockett explained that he did in fact have car insurance, but had simply forgotten to put his new proof of insurance card in his vehicle. Lockett also called his insurer as a means of proving that he had insurance.[5] After this, Locket dialed 911 on his cell phone to request the presence of NOPD officers due to the alleged harassment and racial comments by Bieber.[6] During this call, Arceneaux approached and continued to ask Lockett for proof of insurance, and Lockett told Arceneaux he did not have it but that he (Arceneaux) could call the insurer. After the 911 call, Lockett called his wife Melanie Lockett, who is also a plaintiff in this case, to request her presence due to the escalating situation.[7] After these calls, Arceneaux performed a second search/frisk of Lockett, and directed Lockett to return to his vehicle.

At this point, as a result of Lockett's involvement of the NOPD, Arceneaux and Bieber radioed for their supervisor, Ahner. Ahner asked if Bieber's safety was in any danger, and Bieber responded that he was fine and had the situation under control. However, Bieber again requested Ahner's presence at the scene. In turn, Ahner requested the presence of Lieutenant Lynn Fletcher, an NOPD supervisor.

In response to Lockett's and Ahner's calls, NOPD dispatched Lieutenant Fletcher, and Officers Tocka Clark and Reginald Gains to the scene. In the interim, Thomas had arrived at the scene in the course of his patrol as a SUNO police officer. Lockett informed him of the situation, and indicated that he was being treated in a hostile and racist manner, and had been detained for an unknown reason. Arceneaux then informed Thomas that Lockett had been stopped for speeding and running a red light and stop sign. Thomas remained on the scene to direct passing traffic around the stopped vehicles.

Soon thereafter, Ahner arrived on the scene and was advised by Arceneaux that Lockett had been speeding, had run a red light and stop sign, and had been uncooperative regarding the proof of insurance. Ahner then asked Locket to step out of his vehicle, frisked Lockett a third time, and handcuffed him. At this point, Lockett was read his Miranda rights and placed in the military police vehicle. Mrs. Lockett arrived as her husband was being put into the military police vehicle, and introduced herself as his wife and attorney. However, she claims that she was not allowed to speak with her husband.

Lockett alleges that he asked if he was under arrest as he was being put into the vehicle, and that Ahner responded that he was not, but asked if he wanted to be. While in the car, Lockett alleges that he was questioned by Ahner and Fletcher, who both informed him that they were trying to determine whether to arrest him or give him a ticket. Fletcher told Lockett that Bieber and Arceneaux claimed he had been driving over 100 miles per hour, which Lockett denied by noting that his vehicle has an electronic mechanism that prevents driving at such speeds. Ahner and Fletcher then told Mrs. Lockett that her husband had been driving at 90 miles per hour. [8] At some point, Lockett was allowed to get out of the car to stretch, had his handcuffs readjusted, and was re-mirandized. Throughout this process, Lockett alleges that Ahner continuously insisted that he was in charge. Likewise, Lockett contends that Ahner and Fletcher talked together apart from him, and also notes that Mrs. Lockett had various discussions with Ahner, Fletcher, Thomas, and Clark. Eventually, Lockett was moved from the MP police car, patted down by Gains, and placed in the NOPD police car. Lockett alleges that as the NOPD car pulled off, Ahner repeatedly made statements indicating that he was in charge, and asking Lockett to affirmatively state that he (Ahner) was in charge.

In the end, Lockett was arrested by the NOPD and processed for reckless operation of his vehicle in violation of New Orleans Code of Ordinances 154-382 and cited for the same offense. Eventually, Lockett pled guilty to a non-moving violation and paid a fine. Shortly after his release on the day of the arrest, Lockett and his wife filed a complaint with Captain Douget at the military police headquarters based on allegations of excessive use of force during the arrest that resulted in alleged injuries to Lockett's wrists. The State Defendants note that Lockett did not seek any medical treatment for these alleged injuries until seven days after the arrest.

Lockett and his wife filed the present suit, naming the following defendants:

(1) City of New Orleans;
(2) Piyush "Bobby" Jindal ("Jindal"), in his official capacity as Governor of Louisiana;
(3) Mayor Clarence Ray Nagin ("Nagin"), in his official capacity as Mayor of New Orleans;
(4) Superintendent Warren Riley ("Riley"), in his official capacity as Superintendent of the New Orleans Police Department;
(5) Ahner, individually and in his official capacity as Master Sergeant in the Louisiana Air National Guard;
(6) Bieber, individually and in his official capacity as a member of the Louisiana National Guard;
(7) Arceneaux, individually and in his official capacity as a member of the Louisiana National Guard;
(8) Fletcher, individually and in his official capacity as a Lieutenant in the New Orleans Police Department;
(9) Gains, individually and in his official capacity as a New Orleans police officer;
(10) Tocka Clark, individually and in her official capacity as a New Orleans police officer; and
(11) Thomas, individually and in his official capacity as a SUNO campus police officer.

Lockett asserts claims under 42 U.S.C. §§ 1981, 1983, 1985(3), 1986, and 1988, along with supplemental state law claims for assault and battery, false arrest, false imprisonment, malicious abuse of power, intentional infliction of emotional distress, loss of reputation, emotional distress, humiliation, embarrassment, pain and suffering, and negligence. Mrs. Lockett asserts claims for intentional infliction of emotional distress under Article 2315.6 of the Louisiana Civil Code against Bieber, Arceneaux, Ahner, Fletcher, Gains, Clark, and Thomas. Finally, Plaintiffs also seek injunctive relief against Governor Jindal, Mayor Nagin and Superintendent Riley in the form of a prospective prohibition against racial discrimination and/or profiling, and unlawful searches and seizures by National Guard Military Police against civilians.

THE PARTIES' ARGUMENTS AND DISCUSSION

I. State Defendants' Motion under Rule 12(b)(1)

A. The Parties' Arguments

The State Defendants, in their official capacities, argue for dismissal of the Plaintiffs' claims for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure. The State Defendants argue that Eleventh Amendment sovereign immunity bars any action by a citizen in federal court against a state or any instrumentality of the state for injunctive, declaratory, or monetary relief, as well as any action for monetary relief against state officials sued in their official capacity. *Rodriguez v. Texas Comm'n on the Arts*, 199 F.3d 279 (5th Cir. 2000). Further, although Eleventh Amendment immunity is not a jurisdictional bar in and of itself, it does grant a state the power to assert the immunity defense on its own discretion. *Wis. Dept. Of Corrections v. Schacht*, 524 U.S. 381, 118 S. Ct.

2047, 141 L. Ed. 2d 364 (1998). As such, and to the extent that Plaintiffs' claims proceed against the State Defendants in their official capacities, the Eleventh Amendment bars the prosecution of the present suit.

In opposition, Plaintiffs argue that under the doctrine of Ex Parte Young, suits for prospective injunctive relief against state officials to protect against violations of federal law are not barred by the Eleventh Amendment. *Verizon Md., Inc. v. Public Service Comm'n of Maryland*, 535 U.S. 635, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002). Plaintiffs argue that to determine whether the Eleventh Amendment bars a claim for injunctive relief, a court must "conduct a straightforward inquiry into whether the complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Id.* Thus, Plaintiffs argue that their claim against Governor Jindal for prospective injunctive relief to prevent civil rights violations by the Louisiana National Guard is not barred by the Eleventh Amendment. Furthermore, Plaintiffs argue that the State Defendants' actions in filing a motion for protective order, a motion to compel, and a motion for summary judgment all amount to a constructive waiver of their sovereign immunity. See *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002).

In reply, the State Defendants argue that Plaintiffs' claims for injunctive relief are moot given that the Louisiana National Guard's mission in New Orleans ended by order of the Governor on February 28, 2009. Additionally, the State Defendants argue that their conduct in this litigation does not rise to the level of waiver of immunity in federal court, as they have not exhibited any affirmative intent to waive that immunity. See *Coll. Savings Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd*, 527 U.S. 666, 675-76, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999) ("Generally, we will find waiver either if the State voluntarily invokes our jurisdiction, or else if the State makes a clear declaration that it intends to submit itself to our jurisdiction.").

Plaintiffs respond that their claims for injunctive relief are not moot, as the Governor retains the ongoing authority to install the National Guard in support of local law enforcement in the future. Additionally, Plaintiffs argue that the State Defendants' conduct in this litigation does constitute waiver under the doctrine of Lapides, which has been recognized by the Fifth Circuit in *Fairley v. Stalder*, 294 Fed. Appx. 805 (5th Cir. 2008).

B. Discussion

As an initial matter, the Court notes that "[b]ecause sovereign immunity deprives the court of jurisdiction, the claims barred by sovereign immunity can be dismissed only under Rule 12(b)(1) and not with prejudice." *Warnock v. Pecos County, Tex.*, 88 F.3d 341, 343 (5th Cir. 1996).

The law of Eleventh Amendment sovereign immunity proceeds from the Constitution and considerations of federalism to bar all individuals from suing a State for money damages in federal court. *Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 437, 124 S. Ct. 899, 157 L. Ed. 2d 855 (2004); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996);

Ussery v. Louisiana, 150 F.3d 431, 434 (5th Cir. 1998). Likewise, "the Eleventh Amendment by its terms clearly applies to a suit seeking an injunction, a remedy available only from equity." *Early v. So. Univ. & Agr. & Mech. Coll. Bd. of Sup'rs*, 252 Fed. Appx. 698, 700 (5th Cir. 2007) (quoting *Cory v. White*, 457 U.S. 85, 91, 102 S. Ct. 2325, 72 L. Ed. 2d 694 (1982)). However, "the Eleventh Amendment does not bar claims for prospective relief against state officials acting in their official capacity." See *Edelman v. Jordan*, 415 U.S. 651, 664, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974); *Ex Parte Young*, 209 U.S. 123, 155-56, 28 S. Ct. 441, 52 L. Ed. 714 (1908); *Nelson v. Univ. of Tex. at Dallas*, 535 F.3d 318, 321-22 (5th Cir.2008). Nonetheless, to "satisfy the threshold requirement imposed by Art. III of the Constitution," a plaintiff seeking injunctive relief must "show that he 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged . . . conduct." *City of Los Angeles v. Lyons*, 461 U.S. 95, 109, 103 S. Ct. 1660, 75 L. Ed. 2d 675 (1983) (citations omitted). As such, "[t]o pursue an injunction or a declaratory judgment, the [plaintiffs] must allege a likelihood of future violations of their rights by [the defendant], not simply future effects from past violations." *Armstrong v. Turner Industries, Inc.*, 141 F.3d 554, 563 (5th Cir. 1998) (citing *Fair Employment Council of Greater Washington, Inc. v. BMC Marketing Corp.*, 28 F.3d 1268, 1273, 307 U.S. App. D.C. 401 (D.C. Cir. 1994). Thus, when a plaintiff "allege[s] only a single, past statutory violation and does not assert any likelihood that he will be subjected to a similar violation in the future," he does not have standing to seek the prospective relief allowed under the Ex Parte Young doctrine. *Armstrong*, 141 F.3d at

563; see also *Davis v. Tarrant County, Tex.*, 565 F.3d 214, 2009 WL 931169, *11 (5th Cir. 2009).

State officials may invoke Eleventh Amendment sovereign immunity when they are sued in their official capacities. *Edelman v. Jordan*, 415 U.S. 651, 663, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974). Congress may, however, abrogate a State's sovereign immunity under Section 5 of the Fourteenth Amendment if congressional intent to abrogate is expressed unequivocally and Congress has acted pursuant to a valid exercise of its power. *Ussery*, 150 F.3d at 434.

Congress has not abrogated the states' sovereign immunity for claims arising under 42 U.S.C. § 1983. *Inyo County, Cal. v. Paiute-Shoshone Indians of the Bishop Colony*, 538 U.S. 701, 709, 123 S. Ct. 1887, 155 L. Ed. 2d 933 (2003); *Champagne v. Jefferson Parish Sheriff's Office*, 188 F.3d 312, 314 (5th Cir.1999) (per curiam). Additionally, Congress has not abrogated the states' sovereign immunity under §§1981, 1985, or 1986. See, e.g., *Early*, 252 Fed. Appx. at 700; *Baxter v. Louisiana*, 2003 U.S. Dist. LEXIS 16538, 2003 WL 22175990, *1 (E.D. La. Sept. 19, 2003). Furthermore, the State of Louisiana has not waived its sovereign immunity from § 1983 actions brought against them in federal court. *Kervin v. City of New Orleans*, 2006 U.S. Dist. LEXIS 71047, 2006 WL 284986, *2 (E.D. La. Sept. 28, 2006) (citing La. Rev. Stat. Ann. § 13:5106(A) (Supp.2006) ("No suit against the state or a state agency or political subdivision shall be instituted in any court other than a Louisiana state court.")). Nor has the State of Louisiana waived it sovereign immunity from claims under §§ 1981, 1985, or 1986. See, e.g., *Grier v. Louisiana*, 2004 U.S. Dist. LEXIS 13859, 2004 WL

1638120, *1 (E.D. La. July 22, 2004) (§1981); Baxter, 2003 U.S. Dist. LEXIS 16538, 2003 WL 22175990 at *1 (§§1985 & 1986).

In addition, a State may *constructively* waive its sovereign immunity by its litigation conduct. *Id.* In determining whether a state has waived its sovereign immunity, the Fifth Circuit applies a limited inquiry, under Supreme Court precedent, regarding

> whether the state (1) expressly consented to suit in federal court, see *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985), superseded by statute on other grounds as stated in *Pace v. Bogalusa City Sch. Bd.*, 403 F.3d 272, 280 n. 29 (5th Cir.2005) (en banc), or (2) waived its sovereign immunity through litigation conduct, for example, by voluntarily invoking a federal court's subject matter jurisdiction, see *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 619, 622, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002).

Sossamon v. Lone Star State of Texas, 560 F.3d 316, 330 n.38 (5th Cir. 2009). The Supreme Court has held that waiver requires "an unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment" based on the fact that "constructive consent is not a doctrine commonly associated with the surrender of constitutional rights." *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238 n. 1, 105 S. Ct. 3142, 87 L. Ed. 2d 171 (1985). Likewise, the Fifth Circuit has applied the general rule that a State's waiver of Eleventh Amendment immunity must be unequivocal, if not express. See, e.g., *Perez v. Region 20 Educ. Serv. Ctr.*, 307 F.3d 318, 332 (5th Cir.2002); *Neinast v. Texas*, 217 F.3d 275, 279 (5th Cir. 2000). In this context, the Fifth Circuit has held, under the Supreme Court's decision in Lapides, that a State's voluntary action in removing a case from state to federal court constitutes an unequivocal waiver of Eleventh Amendment immunity. *Meyers ex rel. Benzing v. Texas*, 410 F.3d 236, 255 (5th Cir. 2005). However, the Fifth Circuit has restricted the application of litigation-conduct waiver as described in Lapides to cases in which a state voluntarily invokes the jurisdiction of the federal court by removing a case from state court. See *Id.* at 242-43; see also, e.g., *Spooner v. Jackson*, 251 Fed. Appx. 919, 924 (5th Cir. 2007). In instances other than removal, the Fifth Circuit has not found "that [a state's] litigation conduct created 'inconsistency, anomaly, and unfairness' to a degree that requires waiver of sovereign immunity" as described in Lapides. *In re Katrina Canal Breaches Litigation*, 309 Fed. Appx. 833, 835 (5th Cir. 2009) (citing *Fairley v. Stalder*, 294 Fed. Appx. 805, 810 (5th Cir.2008) and *Lapides*, 535 U.S. 613, 620, 122 S. Ct. 1640, 152 L. Ed. 2d 806 (2002)) (refusing to find litigation-conduct waiver in Katrina-related litigation against the state of Louisiana simply because the state had previously brought other non-related law suits in federal court); *Sossamon*, 560 F.3d at 330 n.38 (refusing to find litigation conduct waiver in suit under Religious Land Use and Institutionalized Persons Act merely because State of Texas requested attorney's fees in its answer). In the end, a determination of whether a state has waived its Eleventh Amendment immunity "must focus on the litigation act the State takes that creates the waiver" and whether that act *clearly* indicates an intent to waive. *Lapides*, 535 U.S. at 620.

Eleventh Amendment immunity "extends to any state agency or entity deemed an 'alter ego' or 'arm' of the state." *Perez v. Region* 20 Educ. Serv. Ctr., 307 F.3d 318, 326 (5th Cir. 2002). Whether an entity is covered by a State's Eleventh Amendment immunity turns on the entity's (1) status under state statutes and case law, (2) funding, (3) local autonomy, (4) concern with local or statewide problems, (5) ability to sue in its own name, and (6) right to hold and use property. *See, e.g.*, *Hudson v. City of New Orleans*, 174 F.3d 677, 681 (5th Cir.1999); *Champagne v. Jefferson Parish Sheriff's Office*, 188 F.3d 312, 313 (5th Cir.1999). Funding is most important. *Id.* at 681-82. These factors suggest that all Louisiana executive departments have Eleventh Amendment immunity. *Champagne*, 188 F.3d at 313; *Darlak v. Bobear*, 814 F.2d 1055, 1060 n. 5 (5th Cir.1987).

In this case, it is clear that the claims against Governor Jindal in his official capacity are barred by the Eleventh Amendment: "The Court cannot entertain jurisdiction over the Governor of the State of Louisiana in [his] official capacity . . . as [he is] protected from suit by the doctrine of sovereign immunity as found in the Eleventh Amendment of the Constitution." *Berthelot v. Boh Brothers Const. Co., L.L.C.*, 2006 U.S. Dist. LEXIS 57817, 2006 WL 2256995, *14 (E.D. La. July 19, 2006).

Likewise, the claims against Ahner, Arceneaux, and Bieber in their official capacities as members of the Louisiana Air National Guard are also barred by the Eleventh Amendment. The Louisiana Constitution provides that "[t]he governor shall be commander-in-chief of the armed forces of the state, except when they are called into service of the federal government." La. Const. art. 4, §5(J). Thus, the Louisiana Air National Guard is an executive department of the state of Louisiana, and therefore is an arm of the state entitled to Eleventh Amendment immunity. See, e.g., *Bryant v. Military Dept. of State of Miss.*, 381 F. Supp. 2d 586, 591 n.6 (S.D. Miss. 2005) ("In each state the National Guard is a state agency, under state authority and control.") [9] (quoting *Knutson v. Wisconsin Air Nat. Guard*, 995 F.2d 765, 767 (7th Cir. 1993)).

Finally, Thomas is entitled to Eleventh Amendment immunity for the claims against him in his official capacity as a SUNO police officer. The Fifth Circuit has held that SUNO is a state agency entitled to Eleventh Amendment immunity. *Richardson v. S. Univ.*, 118 F.3d 450, 454-56 (5th Cir.1997). [10] Thus, to the extent Plaintiffs assert federal claims against Thomas acting in his official capacity as a SUNO police officer, those claims are barred by the Eleventh Amendment. See *Early v. S. Univ. & Agr. & Mech. Coll. Bd. of Sup'rs*, 252 Fed. Appx. 698, 700-701(5th Cir. 2007). [11]

Additionally, the Court finds that the State Defendants have not clearly exhibited an intent to waive their Eleventh Amendment immunity by their litigation conduct in this matter. First of all, this suit was originally brought before this Court by Plaintiffs, and was not removed to the federal forum by the State Defendants. Thus, the Fifth Circuit's narrow application of *Lapides* in the context of waiver by removal is inapplicable.

Furthermore, even if litigation conduct other than removal were sufficient to exhibit a clear intent to waive Eleventh Amendment immunity, the State Defendants participation in this litigation did not indicate such intent. First, although the State Defendants do not explicitly refer to Eleventh Amendment immunity in their answer, they do claim the affirmative defense of absolute immunity. Rec. Doc. 14, at p.2. While this may not be a clear invocation of Eleventh Amendment immunity, it is by no means a clear waiver of that immunity. Furthermore, although Plaintiffs cite the fact that the State Defendants filed a motion for protective order, motion to compel, and motion for summary judgment, this limited participation in the present suit does not rise to the level of waiver by litigation conduct as contemplated by *Lapides* and the Fifth Circuit's application of that case. See S*ossamon v. Lone Star State of Texas*, 560 F.3d 316, 330 n.38 (5th Cir. 2009) (finding no waiver of Eleventh Amendment immunity despite state defendant's request for attorney's fees in answer). Additionally, the Court notes that while the State Defendants have filed a motion for summary judgment, that motion was preceded by the present motion to dismiss on Eleventh Amendment grounds. In the end, the State Defendants' conduct in the current case does not indicate a clear intent to waive the immunity defense under the Eleventh Amendment by invoking the federal jurisdiction of this Court.

Finally, Plaintiffs' claims for prospective injunctive relief against Governor Jindal under the Ex Parte Young doctrine also fail, as Plaintiffs have not shown any likelihood of similar violations by the State Defendants in the future. In fact, the Louisiana

National Guard's law enforcement presence in New Orleans as part of the NGTF was terminated as of March 1, 2009. [12] Accordingly, Plaintiffs have not and cannot "allege a likelihood of future violations of their rights by [the defendant], not simply future effects from past violations." *Armstrong v. Turner Industries, Inc.*, 141 F.3d 554, 563 (5th Cir. 1998). As such, Plaintiffs claims for prospective injunctive relief against the State Defendants fail as a matter of law.

II. State Defendants' Motion for Summary Judgment

A. The Parties' Arguments[13]

(1) State Defendants Arguments in Support

The State Defendants have also moved for summary judgment on qualified immunity grounds as to *all federal claims* against them in their *individual* capacities.

As for Lockett's §1983 tort claims, the State Defendants argue that they are entitled to qualified immunity based on the fact that the MP Defendants had probable cause to arrest Lockett for traffic violations. The State Defendants note that evidence of an officer's subjective intent is irrelevant to a qualified immunity defense; the only proper inquiry is whether the official violated clearly established statutory or constitutional rights which a reasonable person would have known. *Conn. v. Gabbert*, 526 U.S. 286, 119 S. Ct. 1292, 143 L. Ed. 2d 399 (1999); *Crawford-El v. Britton*, 523 U.S. 574, 588, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998). In this situation, the State Defendants argue that the MP Defendants had reasonable suspicion that a traffic offense had been committed sufficient to justify their stop of Lockett's vehicle. Likewise, the State Defendants argue that the MP Defendants developed probable cause to arrest Lockett as a result of those violations and the circumstances of the stop. The State Defendants note that "[t]he determination of reasonable grounds for an investigatory stop, or probable cause for arrest, does not rest on the officer's subjective beliefs or attitude, but turns on a completely objective evaluation of *all* the circumstances known to the officer at the time of the challenged action." *State v. Landry*, 729 So. 2d 1019 (La. 1999). Further, the State Defendants point out that qualified immunity in the context of false arrest and unreasonable seizure claims can only be lost if there is "not even 'arguably' . . . probable cause for the arrest." *Hart v. O'Brien*, 127 F.3d 424, 444 (5th Cir. 1997). In sum, because Bieber and Arceneaux witnessed Lockett speeding as well as running a stop sign and red light, the State Defendants argue that there was probable cause to both stop and arrest Lockett for reckless operation - for which he was in fact arrested and eventually cited by NOPD - in violation of New Orleans Code of Ordinances §154-382. [14] Thus, based on their objectively reasonable suspicion and probable cause belief that a traffic offense had occurred, the State Defendants' are entitled to qualified immunity.

With specific reference to Lockett's § 1983 false arrest claims, the State Defendants argue that the MP Defendants had probable cause - that is "reasonably trustworthy information . . . sufficient to warrant a prudent man in believing that [Lockett] had committed or was committing an offense" - to support an arrest for reckless operation. *Beck v. Ohio*, 379 U.S. 89, 91, 85 S. Ct. 223, 13 L. Ed. 2d 142 (1964). Further, the State Defendants argue that even if Lockett's self-serving statements denying any traffic violations are taken at face value, this *still* does not vitiate a finding that the MP Defendants had sufficient probable cause based on their observations of Lockett's driving to support the arrest. In the end, the probable cause inquiry hinges not on whether the charges are defensible, but rather on whether the arresting officers had probable cause. See *Baker v. McCollan*, 443 U.S. 137, 145, 99 S. Ct. 2689, 61 L. Ed. 2d 433 (1979).

As for Lockett's excessive force claims under § 1983, the State Defendants argue that their conduct in arresting and restraining Lockett was objectively reasonable in the circumstances. The State Defendants emphasize that the only use of force involved in this case was handcuffing, and further note that Ahner's affidavit indicates that he placed his little finger between the handcuff and Lockett's wrist to ensure they were not placed too tightly. As such, the State Defendants argue that they are entitled to qualified immunity on the excessive force claims.

The State Defendants also argue that Lockett's unreasonable search and seizure claims under § 1983 fail as a result of their qualified immunity defense. Specifically, because there was probable cause to arrest Lockett, the various searches of Lockett's person were justified. See *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980) (noting that formal arrest does is not necessarily a temporal prerequisite to a search incident to arrest, as long as probable cause exists).

The MP Defendants also argue that Lockett's § 1985(3) claims of conspiracy to interfere with his civil rights fail as a matter of law. [15] As an initial matter, the MP Defendants argue that since they and Fletcher (one of the NOPD officers who effected Lockett's arrest) are all members of the same governmental entity, "[u]nder the intracorporate conspiracy doctrine, alleged concerted action by employees or officials of the same entity or organization cannot constitute a conspiracy for purposes of §1985." *Hilliard v. Ferguson*, 30 F.3d 649, 653 (5th Cir. 1994). As such, because the MP Defendants and Fletcher were effectively operating as members of the NOPD by their assignment through Task Force Gator/NGTF, Lockett's conspiracy claims necessarily fail under the intracorporate conspiracy doctrine. Likewise, the MP Defendants argue that Lockett's §1985 claims fail because they have not made a showing of any racial animus, a required element of the §1985 action. The MP Defendants argue that Lockett's internalized reaction to Bieber's alleged statement that he "needed to go to SUNO" simply does not support a finding of racial animus. Furthermore, even if Bieber's statement was intentionally racist, the MP Defendants argue that there is *no evidence* Arceneaux, Ahner, and Fletcher also harbored racial animus towards Lockett, and consequently there can be no § 1985 conspiracy.

As a result of the failure of Lockett's § 1985 claims, the MP defendants argue that his claims under § 1986 are also untenable. See *Rhodes v. Mabus*, 676 F. Supp. 755 (S.D. Miss. 1987). Furthermore, as for the § 1986 claim asserted against Thomas, the State Defendants point out that the Lockett *did not include a § 1985 claim* *against Thomas*, and thus cannot assert a § 1986 claim against him.

In addition to their qualified immunity grounds for dismissal of Plaintiffs' state law pendent claims, the State Defendants also invoke several state-law statutory immunities as a basis for summary judgment. First, the State Defendants cite Louisiana Revised Statutes §9:2798.1, which affords employees and officials of public entities with immunity from tort suits for discretionary acts. In addition, with respect to Lockett's claims of excessive force under § 1983, the State Defendants cite the Fifth Circuit's decision in Glenn v. City of Tyler, which held that handcuffing too tightly, without more, does not amount to excessive force. 242 F.3d 307 (5th Cir. 2001).

Additionally, the MP Defendants cite Louisiana Revised Statutes § 29:23, which allegedly immunizes national guardsmen from suit for any claims against guardsmen arising during their active service for the State of Louisiana. Likewise, the MP Defendants assert immunity under Louisiana Revised Statutes § 29:735(a)(1), which immunizes state agents from suit, except in the case of willful misconduct, for injuries resulting from their activities involving "homeland security and emergency preparedness." Under these statutes, the MP Defendants argue that the claims against them are barred by guardsmen immunity under §29:23, and Thomas argues that the claims against him are barred by §9:2798.1.

Finally, as for Melanie Lockett's claims against the MP Defendants, the NOPD officers, and Thomas for bystander damages resulting from intentional infliction of emotional distress under Louisiana Civil Code Article 2315.6, the MP Defendants and Thomas argue simply that the claims are unavailing as a matter of fact. Specifically, the MP Defendants and Thomas argue that Melanie Lockett's witnessing of Lockett's arrest, even if it were a false arrest and unreasonably long period of detention, does not give rise to a claim under Article 2315.6. *Irvin v. Foti*, 1999 U.S. Dist. LEXIS 11515, 1999 WL 504916 (E.D. La. 1999). Simply put, witnessing her husband being detained was not a sufficiently traumatic event to give Melanie Lockett a claim under Article 2315.6.

(2) Plaintiffs' Arguments in Opposition

In opposition, Lockett argues that the State Defendants are not entitled to qualified immunity with respect to his § 1983 causes of action. Lockett contends that the alleged probable cause on which the State Defendants rely for their qualified immunity defense was merely a post-hoc fabrication to justify his treatment at their hands. Specifically, Lockett argues that the offense of "reckless operation" includes two elements: (1) operation of a vehicle and (2) criminal negligence. *State v. Redfearn*, 504 So. 2d 1005 (La. App. 1 Cir. 1987). "Criminal negligence" is defined as "such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances." *Id.* Lockett argues that none of the State Defendants' incident reports reference *any type of endangerment* with respect to his driving. Additionally, Lockett notes that the various defendants' accounts of his speed have continuously changed throughout the course of this litigation, which suggests post facto justification for the arrest. Furthermore, Lockett argues that he was initially only informed of an alleged *speeding* violation, with the additional alleged violations mentioned only after his 911 call regarding racial discrimination. In any event, Lockett argues that questions of material fact remain with respect to the issue of probable cause and whether the State Defendants, amongst others, concocted additional charges over the course of his arrest.

In addition, even if the State Defendants did witness Lockett commit the alleged offenses, Lockett argues that the testimony of Arceneaux and Bieber defeats any claim that there was probable cause to make an arrest. In fact, Arceneaux and Bieber both admitted in their depositions that they only intended to *warn* Lockett about his alleged traffic violations at the commencement of the traffic stop. Bieber's deposition testimony, Rec. Doc. 51-3, Exhibit C to Pls.' Opp., p. 67; Arceneaux's deposition testimony, Rec. Doc. 51-4, Exhibit D, pp. 123-24. As such, Lockett contends that there was no immediate decision to arrest. Additionally, Lockett notes that Arceneaux even testified that Lockett's driving amounted merely to *careless*, but not *reckless* driving. Ex. D. at pp. 103-112. [16] In this context, Lockett points out that an officer only has the power to arrest when "[t]he person to be arrested has committed an offense in his presence; and if the arrest is for a misdemeanor, *it must be made immediately or on close pursuit*." La Code Crim. Proc. art. 213. Thus, because Lockett's arrest occurred only after his 911 call regarding alleged racial discrimination, he contends that, by their own admission, Arceneaux and Bieber did not have probable cause, and thus the State

Defendants' qualified immunity defense fails. Finally, even if the State Defendants did witness the alleged traffic violations, Lockett contends that none of them alleged that he disregarded others and/or grossly deviated from the standard of care of an ordinary driver. Thus, Lockett argues that there was no probable cause for a "reckless driving" arrest, and in the very least asserts that there is a material question of fact on this issue.

As for the excessive use of force claims, Lockett argues that the MP Defendants were inspired by malice when they searched him multiple times and eventually handcuffed him *only after Bieber made the allegedly racially charged statements*. In fact, Lockett notes that after the searches by the MP Defendants, which were allegedly for safety reasons, they actually allowed him to return to his vehicle *without searching the vehicle*. Lockett suggests that this indicates that the searches were performed in retaliation for his calling 911 to report racial discrimination. [17] Additionally, Lockett contends that the handcuffing caused "meaningful" injury to his wrists, for which he filed a complaint and eventually sought medical attention. As such, Lockett argues that there are material issues of fact regarding his claims of excessive force.

Lockett next contends that his claims of unreasonable search and seizure are validated by the fact that he was searched four different times and unreasonably detained for over an hour, all for what started as a simple traffic stop. Under the Supreme Court's decision in Terry v. Ohio, Lockett argues that the continuation of the stop extended beyond the time that any reasonable suspicion existed to continue the stop. 392

U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). In this context, Lockett argues that he was only searched by Bieber *after* the allegedly racial statements, and by Arceneaux only *after* he called 911 to report the alleged racial harassment. Furthermore, Lockett notes that Bieber's own testimony indicates that Lockett's detention continued *only because he called 911 to report the alleged racial harassment*. Rec. Doc. 51-3, Exhibit C, p.p.67-68. Lockett argues that this admitted reason does not constitute reasonable suspicion for the continued detention, and to the contrary suggests an ill-motive and abuse of power. Likewise, Lockett argues that although Ahner arrived on the scene, searched him again, and handcuffed him, Ahner specifically denied arresting Lockett, noting that NOPD was to make the actual arrest. Rec. Doc. 51-7, p. 35. Based on these circumstances, Lockett argues that his claims of unreasonable search and seizure are viable on the present record.

As for his claims under § 1985 and § 1986, Lockett contends that because the MP Defendants were members of the National Guard and Fletcher was a member of the NOPD at the time of the events in question, the intracorporate identity theory is inapplicable. Likewise, Lockett contends that he has sufficiently alleged racial animus to support his claims, in the form of Bieber's alleged statement and the MP Defendants' reaction to Lockett's 911 call. Based on the argued validity of his § 1985 claims, Lockett contends that the State Defendants' contingent opposition to his § 1986 claims also fails. Finally, Lockett acknowledges that he has not asserted a § 1985 claim against officers Thomas, Gaines, and Clark, but only because they did not directly engage in the alleged conspiracy.

Nonetheless, Lockett contends that his § 1986 claims against those officers is nonetheless valid because, despite their non-participation in the alleged conspiracy, they did not intervene to prevent the violation of Lockett's civil rights. In the end, Lockett admits that a § 1985 conspiracy must exist to support a § 1986 claim, but disputes the State Defendants' position that the defendants in each claim must be identical.

With respect to their various state law claims, Plaintiffs assert that the multiple immunities invoked by the State Defendants are inapplicable. First, §9:2798.1 immunity only applies in the context of discretionary acts. Plaintiffs argue that Defendant Thomas is not entitled to this immunity because the claims against him do not involve his discretionary acts as a state police officer, but rather implicate his failure to uphold his duty to prevent violations of civil rights. Next, Plaintiffs argue that § 29:23 National Guard immunity does not apply to protect the MP Defendants because § 29:23 must be read together with §29:23.1. Plaintiffs argue that § 29:23.1 limits immunity for national guardsmen to situations in which "the national guardsmen [are] employees of the United States of America for purposes of respondeat superior liability under the Federal Tort Claims Act." La. Rev. Stat. Ann. § 29:23.1. Further, § 29:23.1 provides the following:

> This Section is not intended to prevent Civil Code Article 2320 or other such laws from imposing master-servant liability on the state, or to prevent Civil Code Articles 2315 et seq. generally from imposing liability in

> circumstances to which such codal articles and/or laws would otherwise impose liability for damages caused by the offenses or quasi offenses of members of the National Guard committed within the course and scope of their National Guard duties when the Federal Tort Claims Act does not apply.

Id. Under this section, Plaintiffs argue that the MP Defendants are not immune from suit under state law. See *Giardina v. Lawrence*, 2009 U.S. Dist. LEXIS 36432, 2009 WL 1158857, *2 (E.D. La. Apr. 29, 2009). Finally, Plaintiffs argue that the State Defendants' reliance on §29:735(a)(1) is also misplaced because the events at issue here occurred 3 years after Hurricane Katrina, and thus were not in the context of homeland security or emergency preparedness. As such, because §29:735(a)(1) immunity has been limited to events contemporaneous or directly in preparation for emergent events, the immunity does not apply. See *In Re Katrina Canal Breaches Consolidated Litigation*, 2008 U.S. Dist. LEXIS 90520, 2008 WL 4691623 (E.D. La. Oct. 22, 2008). Additionally, Plaintiffs note that §29:735(a)(1) immunity does not apply to wilful violations, and thus contend that their claims that the State Defendants trumped up charges against Lockett to validate his arrest amount to wilful violations.

Finally, Mrs. Lockett argues that her claims for emotional distress are valid as she is a proper party under Article 2315.6 and experienced mental distress while observing her husband's arrest. Mrs. Lockett distinguishes the Irvin decision relied on by the State Defendants. Mrs. Locket notes that the plaintiff's claims in that case were dismissed based on the fact that witnessing her daughter's arrest alone was not the type of event contemplated by the statute because plaintiff was not aware that her daughter would die as a result. In contrast, Mrs. Lockett actually witnessed both her husband's arrest as well as the alleged hostility, discrimination, embarrassment,[18] and anxiety that he endured throughout the process. As such, because she contemporaneously witnessed both the arrest and the various effects of that arrest, Mrs. Lockett contends that her emotional distress claims are viable.

3) Parties' Reply/Sur Reply Arguments

In reply, the State Defendants argue that Lockett *has never denied* that he was speeding. Further, despite Lockett's attempts to create issues of fact regarding Bieber and Arceneaux's testimony as to *how far over* the speed limit he was traveling, the State Defendants contend that Lockett's actual speed is irrelevant. Specifically, the State Defendants assert that "[i]t is not material how much in excess of the 45 m.p.h. speed limit Lockett was traveling" and that "Plaintiffs' attempt to create an issue of fact with respect to how fast Lockett was driving, or what time he was pulled over or the distance between the MP sedan and Lockett's vehicle . . . are of no moment." Rec. Doc. 72, p.2. The State Defendants reiterate their position that Bieber and Arceneaux had probable cause to stop and arrest Lockett for traffic violations.

Furthermore, as for Lockett's excessive force and search and seizure claims, the State Defendants contend that Lockett has offered no evidence to overcome their entitlement to qualified immunity. In sum, the State Defendants argue that the only support for Lockett's claims on these grounds are his own self-serving opinions regarding the various defendants intent in arresting him, as well as counsel's mere assertions and conclusory legal arguments. The State Defendants contend that an officer's right to conduct a brief investigatory stop carries with it the right to use reasonable force to effectuate that stop. See *Muehler v. Mena*, 544 U.S. 93, 125 S. Ct. 1465, 161 L. Ed. 2d 299 (2005). Both Arceneaux and Ahner testified that Lockett's demeanor was angry and rude, to the point that they thought he could pose a danger. Ahner further stated that he decided to handcuff Lockett only after he spoke with Lockett and determined that he was being uncooperative and might pose a threat. [19] As such, the State Defendants argue that Arceneaux and Ahner's conduct did not constitute excessive force or unreasonable search and seizure because probable cause to arrest preceded the search.

Additionally, the State Defendants argue that Plaintiffs have presented no further support of their § 1985 and §1986 claims beyond Lockett's internalized interpretation of Bieber's statement. More importantly, the State Defendants argue that Plaintiffs have not presented *any actual evidence* of a conspiracy. Likewise, the State Defendants note that Plaintiffs have not offered any additional law on the issue of whether their § 1986 claims can proceed in the absence of some valid § 1985 claim.

As for the issues of state-law immunity, the State Defendants note that Defendant Thomas is immune under § 9:2798.1 because his failure to intervene in the events leading up to Lockett's arrest was discretionary, and thus fell within the ambit of the statutory immunity. Furthermore, the State Defendants note that § 9:2798.1 immunity extends even to negligently performed discretionary acts, and thus Thomas's alleged negligent failure to intervene does not vitiate his immunity. Additionally, as to Plaintiffs' argument regarding national guardsmen's immunity, the State Defendants recognize that §23.1 does not relieve the *State* of master-servant liability for acts performed by national guardsmen in service of the State. However, the State Defendants also note that Plaintiffs *have not sued the State*, but rather have sued the MP Defendants in personam, and thus the immunity provided in §29:23 applies *as to the individual guardsmen defendants*. The State Defendants also contend that §29:735(a)(1) immunity does apply because the NGTF operations were the result of the Governor's extension of the state of emergency caused by Katrina.

Finally, the State Defendants again cite Irvin in support of their position that Mrs. Lockett simply has not factually asserted a claim under Article 2315.6 for bystander emotional damages.

Plaintiffs in reply concede that Arceneaux and Bieber may have had probable cause to effect a stop of Lockett's vehicle, but again note that both Arceneaux and Bieber admitted that the violations for which they stopped Lockett *did not warrant arrest*, and were in fact initially only going to elicit a warning. However, Plaintiffs argue that Bieber has admitted that he detained Lockett not because of the traffic violations, but as the result of his 911 call regarding racial discrimination. Based on this admission, Plaintiffs argue that all actions taken by the State Defendants after the 911 call - including the searches, handcuffing, and arrest - were without probable cause, thus vitiating any qualified immunity.

Likewise, Plaintiffs dispute the State Defendants' position that there is no evidence of fabricated offenses against Lockett. Plaintiffs point out that Lockett testified that he was only informed of the speeding violation, and Mrs. Lockett's hand written notes from the scene only reference the speeding violation.

Additionally, Plaintiffs argue that there is a question of fact as to whether Bieber's call reporting the traffic stop preceded Lockett's 911 call or vice-versa. Plaintiffs cite the tape of Bieber's call to dispatch, which includes radio transmissions all the way through Lockett's arrival at central lockup. However, the tape does *not* include a 911 dispatch in response to Lockett's 911 call. Plaintiffs argue that this proves that Lockett's 911 call preceded Bieber's call reporting the traffic stop, which presents an issue of fact regarding whether Bieber's reporting of the stop was in response to Lockett's 911 call regarding racial discrimination. [20]

Plaintiffs also contend that the conflict between the deposition testimony of various of the State Defendants in comparison with the incident reports in this case reveal that the reports were fabricated. Plaintiffs argue that this constitutes "absolute evidence" of malice to support a claim for unreasonable search and seizure.

Finally, Plaintiffs reiterate their arguments that (1) their allegations and the record support their § 1985 and § 1986 claims; (2) that none of the State Defendants are entitled to any state-law immunity; and (3) that

Mrs. Lockett has asserted a viable claim for bystander damages under Article 2315.6.

B. DISCUSSION

Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (citing Fed. R. Civ. Proc. 56(c)). The moving party bears the initial burden of demonstrating to the court that there is an absence of genuine factual issues. *Id.* Once the moving party meets that burden, the non-moving party must go beyond the pleadings and designate facts showing that there is a genuine issue of material fact in dispute. *Id.* "A factual dispute is 'genuine' where a reasonable jury could return a verdict for the non-moving party. If the record, taken as a whole, could not lead a rational trier of fact to find for the non-moving party, then there is no genuine issue for trial and summary judgment is proper." *Weber v. Roadway Exp., Inc.*, 199 F.3d 270, 272 (5th Cir. 2000) (citations omitted). The non-moving party's burden "is not satisfied with 'some metaphysical doubt as to the material facts,' by 'conclusory allegations,' by 'unsubstantiated assertions,' or by only a 'scintilla' of evidence. [The courts] resolve factual controversies in favor of the nonmoving party, but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts. *[The courts] do not, however, in the absence of any proof, assume that the nonmoving party could or would prove the* *necessary facts*." *Little*, 37 F.3d at 1075 (emphasis in original)(citations omitted).

The Court will address each of Plaintiff's claims, and the State Defendants' various grounds for summary judgment as to those claims, in order.

(1) § 1983 Claims

Lockett asserts claims under § 1983 against the MP Defendants [21] for false arrest, excessive force, and unconstitutional search and seizure. The MP Defendants generally assert qualified immunity as a defense to these claims.

"The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Pearson v. Callahan*, U.S. , 129 S. Ct. 808, 815, 172 L. Ed. 2d 565 (2009). After a defendant has invoked qualified immunity, the burden shifts to the plaintiff to demonstrate the inapplicability of the defense. *Club Retro LLC v. Hilton*, 568 F.3d 181, 2009 U.S. App. LEXIS 9864, 2006 WL 6245546, *5 (5th Cir. May 6, 2009) (citing *McClendon v. City of Columbia*, 305 F.3d 314, 323 (5th Cir.2002) (en banc)). To discharge this burden, a plaintiff must: (1) "claim that the defendants committed a constitutional violation under current law"; and (2) "that the defendants' actions were objectively unreasonable in light of the law that was clearly established at the time of the actions complained of." *Id.* (citing *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 253 (5th Cir.2005)). [22] "To be 'clearly established' for purposes of qualified immunity, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Kinney v. Weaver*, 367 F.3d 337, 349-50 (5th Cir.2004) (en banc) (alteration in original). Given the fundamentally objective inquiry that drives a qualified immunity analysis, "a defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly motivated [because] [e]vidence concerning the defendant's subjective intent is simply irrelevant to that defense." *Crawford-El v. Britton*, 523 U.S. 574, 588, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998).

In this case, Lockett has alleged three constitutional tort claims: (a) wrongful arrest; (b) excessive use of force; and (c) unreasonable search and seizure. The Court will address in turn each claim under the two-pronged qualified immunity inquiry.

(a) False Arrest

First, as for Lockett's false arrest claims there is no doubt that "[a]n arrest is unlawful unless it is supported by probable cause." *Deville v. Marcantel*, 567 F.3d 156, 2009 WL 1162586, *4 (5th Cir. 2009) (citing *Flores v. City of Palacios*, 381 F.3d 391, 402 (5th Cir. 2004). "Probable cause exists when the totality of the facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." *Resendiz v. Miller*, 203 F.3d 902, 903 (5th Cir.2000). "If there was probable cause for any of the charges made . . . then the arrest was supported by probable cause, and the claim for false arrest fails." *Wells v. Bonner*, 45 F.3d 90, 95 (5th Cir.1995). Additionally, "[a]n officer may conduct a warrantless arrest based on probable cause that an individual has committed even a minor offense, including misdemeanors." *Deville*, 567 F.3d 156, 2009 WL 1162586 at *4 (citing *Atwater v. City of Lago Vista*, 532 U.S. 318, 354, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001)). Furthermore "evidence that the arrestee was innocent of the crime is not necessarily dispositive of whether the officer had probable cause to conduct the arrest because probable cause requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Id.* As such, an officer's own uncontradicted testimony regarding the occurrence of an arrestable violation can by itself support a finding of probable cause, even in the face of plaintiff's denial of that violation. *Id.* In the end, even "if officers of reasonable competence could disagree on whether or not there was probable cause to arrest a defendant, immunity should be recognized." *Gibson v. Rich*, 44 F.3d 274, 277 (5th Cir.1995).

In this case, both Bieber and Arceneaux testified that they stopped Lockett for speeding, running a red light, and running a stop sign. See Rec. Doc. 51-3, pp.31-32; Rec. Doc. 51-4, p.75. Based on this testimony, Bieber and Arceneaux were clearly justified in stopping Lockett's vehicle based on their observation of what they objectively believed to be traffic violations. See *Whren v. United States*, 517 U.S. 806, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996). Additionally, these violations, supported by the testimony of Bieber and Arceneaux and at least in part undenied by Lockett, gave rise to probable cause for Lockett's arrest for reckless driving, which was effected upon arrival of the NOPD officers.

The State Defendants have noted in reply, and the Court agrees, that although Lockett has questioned the various accounts of how fast he may have been going prior to the traffic stop, and denied at his deposition that he ran the red light and the stop sign, he has never expressly denied the fact that he was speeding prior to the stop. In any event, Lockett's doubts about the validity of the basis for his traffic stop and arrest do not defeat the Court's finding of probable cause based on the testimony of the officers. *Deville*, 567 F.3d 156, 2009 WL 1162586 at *4. Furthermore, although Lockett points out that Bieber and Arceneaux both testified that they initially only intended to issue a warning, this subjective intent has no effect on the validity of the probable cause arrest. See Rec. Doc. 51-3, Exhibit C, p. 67; Rec. Doc. 51-4, Exhibit D, pp. 123-24. As the Supreme Court held in *Ohio v. Robinette*, citing *Whren*:

> the fact that [an] officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action . . . . Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis.

519 U.S. 33, 37, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996). Additionally, while Lockett notes Bieber's testimony that in his opinion it would be inappropriate to handcuff someone for a minor traffic violation, Rec. Doc. 51-3 at p. 71-72, the fact that Bieber may have had a different appreciation than other officers regarding the probable cause for Lockett's arrest does not vitiate the validity of the arrest. First of all, the Fifth Circuit in *Deville*

noted the Supreme Court's holding that even minor traffic violations may give rise to probable cause for arrest. Second, Arceneaux and Bieber informed their supervisor Ahner of the traffic violations they had witnessed Lockett commit. Ahner testified that the NOPD made the final determination regarding whether to arrest Lockett based on those traffic violations. Rec. Doc. 51-7, p. 90. As such, while Bieber may not have subjectively believed there was probable cause to arrest, "if officers of reasonable competence could disagree on whether or not there was probable cause to arrest a defendant, immunity should be recognized." *Gibson v. Rich*, 44 F.3d 274, 277 (5th Cir.1995). Additionally, "where a police officer makes an arrest on the basis of oral statements by fellow officers, an officer will be entitled to qualified immunity from liability in a civil rights suit for unlawful arrest provided it was objectively reasonable for him to believe, on the basis of the statements, that probable cause for the arrest existed." *Deville*, 567 F.3d 156, 2009 WL 1162586, *6 (citing *Rogers v. Powell*, 120 F.3d 446, 455 (3d Cir. 1997)). Thus, because there is no evidence that Ahner had any reason to disbelieve Bieber and Arceneaux's account of Lockett's traffic violations, he is likewise entitled to qualified immunity as to Lockett's false arrest claims.

Lockett contends that there is no evidence in any of the statements of the MP Defendants or in the incident reports generated from his arrest that support a specific probable cause finding as to the reckless driving offense for which he was ultimately arrested. Likewise, Lockett suggests, on the basis of argument and speculation, that the MP Defendants fabricated the red light and stop sign violations after he made allegations of racial discrimination in order to support his arrest. These contentions in opposition to the MP Defendants' claims of qualified immunity are unavailing. Lockett is correct that the elements of the crime of reckless driving include (1) operation of a vehicle and (2) criminal negligence. However, Lockett's contention that the lack of any reference to endangerment in the MP Defendants' reports results in a failure of probable cause as to the crime of reckless driving does not withstand scrutiny. First of all, Arceneaux noted in his deposition testimony that he initially wanted to warn Lockett about his driving due to the fact that the area in which his violations took place is relatively busy, including a prevalence of youth pedestrian traffic. Rec. Doc. 51-4, p.123. Additionally, the definition of "criminal negligence" is extremely broad and circumstance-specific: "such disregard of the interest of others that the offender's conduct amounts to a gross deviation below the standard of care expected to be maintained by a reasonably careful man under like circumstances." Louisiana Revised Statutes § 14:12. Given this broad definition and the circumstances of the case, Bieber and Arceneaux had probable cause to arrest for reckless driving based on the traffic violations they witnessed. Furthermore, Lockett's resort to the elements of the crime of reckless driving is misplaced because the probable cause standard does not consider whether the defendant is actually innocent of the crime for which he is arrested, but merely addresses whether there is a probability or substantial chance that the crime was committed. Additionally, and as noted earlier, "[i]f there was probable cause for any of the charges made . . . then the arrest was supported by probable cause, and the claim for false arrest fails." *Wells v. Bonner*, 45 F.3d 90, 95

(5th Cir.1995). With this principle in mind, the Court notes that Louisiana courts have held that even the offense of "careless driving," which both Bieber and Arceneaux testified was a proper characterization of Lockett's traffic violations, constitutes an arrestable offense. See *State v. Short*, 839 So.2d 173 (La. App. 4 Cir. 2003) ("It is undisputed that the officers saw the defendant commit a traffic offense. At that point, they had probable cause to stop him for the commission of that offense. See *State v. Wilson*, 467 So.2d 503, 515 (La.1985); *State v. Diaz*, 2001-0523 (La. App. 4 Cir. 10/31/01), 800 So.2d 1090)). As such, Lockett's attempts to defeat the MP Defendants' qualified immunity are unsuccessful.

Furthermore, the intervening events alleged by Lockett in support of his claims attempt to call his eventual arrest into question based on the subjective intent of Bieber and Arceneaux in responding to his protestations of racial discrimination and calling their supervisor Ahner to the scene. However, given the existence of probable cause for Lockett's arrest based on his traffic violations, these various intervening subjective aspects of the detention and arrest, which take up the majority of Lockett's opposition and reply memoranda, are irrelevant. In fact, the Supreme Court has held that "[o]ur cases make clear that an arresting officer's state of mind (except for the facts that he knows) is *irrelevant to the existence of probable cause*." Devenpeck v. Alford, 543 U.S. 146, 153, 125 S. Ct. 588, 160 L. Ed. 2d 537 (U.S. 2004).

Finally, this case is distinguishable from the Fifth Circuit's decision in Deville, which held that an officer was not entitled to qualified immunity based on the fact that the plaintiff, who was arrested for speeding and refusing to sign a traffic citation, "provided evidence that would allow the jury to disbelieve [the officer's] testimony" that supported his argument for probable cause. 567 F.3d 156, 2009 WL 1162586 at *5. Specifically, the Fifth Circuit noted that the defendant officer "admitted that he has a history of problematic arrests and that citizens have made complaints against him"; admitted that he had previously filed false charges against another individual; and was unable to verify the actual speed at which plaintiff was traveling, which precluded him from refuting Plaintiff's sworn affidavit statement that her cruise control was set on 40 m.p.h. at the time of the alleged violation. *Id.* The egregious history of the officer in Deville is clearly distinguishable from the circumstances of the present case, in which there is no evidence that any of the MP Defendants have any history of improper arrests. Thus, even though the officer's testimony in Deville was insufficient to support a finding of probable cause, the context of that testimony is drastically different than the statements of the MP Defendants in this case.

Accordingly, the MP Defendants' motion for summary judgment as to Lockett's claims of false arrest should be granted on the basis of qualified immunity. Lockett has not proven that his arrest was not based on probable cause, and thus has not met the first prong of the *Saucier/Pearson* test, as he has failed to show any constitutional violation resulting from the MP Defendants' actions.

(b) Excessive Use of Force

Lockett also asserts claims under § 1983 for excessive use of force by the MP Defendants. The Fourth Amendment's protection against unreasonable search and seizures requires that officers refrain from using excessive force when effectuating an arrest. *Graham v. Connor*, 490 U.S. 386, 394-95, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). The Supreme Court has described this inquiry as a broadly based, objective one:

> As in other Fourth Amendment contexts, however, the "reasonableness" inquiry in an excessive force case is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation. An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.

Id. at 397 (citations omitted). In the Fifth Circuit "[i]t is clearly established law . . . that in order to state a claim for excessive force in violation of the Constitution, a plaintiff must allege (1) an injury, which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable." *United States v. Brugman*, 364 F.3d 613, 616 (5th Cir. 2004) (citing *Bazan v. Hidalgo County*, 246 F.3d 481, 487 (5th Cir.2001)). [23] Further, "[a]lthough a showing of 'significant injury' is no longer required in the context of an excessive force claim, [the Fifth Circuit] does require a plaintiff asserting an excessive force claim to have suffered at least some form of injury." *Glenn v.*

City of Tyler, 242 F.3d 307, 314 (5th Cir. 2001) (internal quotations omitted). As such, "[t]he injury [alleged] must be more than a de minimis injury and must be evaluated in the context in which the force was deployed." *Id.* Under this standard, the Fifth Circuit has held that "handcuffing too tightly, without more, does not amount to excessive force" in the context of a probable cause arrest. *Id.*

As an initial matter, the Court notes that the Fifth Circuit's holding in *Glenn* squarely defeats Lockett's claims of excessive force, insofar as they are based on the alleged tightness of his handcuffs.

Nonetheless, even if the handcuffing were sufficient to state an injury under the excessive force analysis, and even if Lockett's additional bases for his excessive force claims - namely the various searches performed during his detention could constitute some form of "injury," Lockett's excessive force claims still fail. First, based on the above-cited precedent, Lockett's arguments concerning the alleged malice of the MP Defendants are irrelevant as a matter of law. As the Supreme Court noted in Graham, even "[a]n officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force." 490 U.S. at 397. Any allegation, even assuming it were valid, that the MP Defendants' were inspired by some sort of racial animus in their treatment of Lockett is entirely misplaced in terms of an excessive force claim. [24] As such, the sole inquiry into Lockett's claims of excessive force must focus on the objective reasonableness of the force used in his detention and arrest in light of the need for such force in the circumstances.

Under this objective inquiry, the Court finds that the MP Defendants' treatment of Lockett during the traffic stop and ensuing detention fell far short of the level of excessive force required to state a claim under § 1983. Initially, the Court notes that Lockett has not alleged nor even argued any *actual injury*, mental, physical, de minimis, or otherwise, arising from the *three searches* performed by Bieber, Arceneaux, and Ahner. Furthermore, even if those searches were in some way slightly injurious, they were performed, according to the officers, simply to ensure their safety in what was by all accounts a somewhat uneasy atmosphere. In sum, the Court finds that Lockett has failed to show a constitutional violation in his allegations of excessive force, and thus has failed to meet the first prong of the *Saucier/Pearson* test. As such, the MP Defendants are entitled to qualified immunity on Lockett's excessive force claims.

(c) Unconstitutional Search and Seizure

Lockett finally alleges a general claim for violation of his Fourth Amendment right to be free from unreasonable search and seizure. Lockett relies on the Supreme Court's decision in *Terry v. Ohio* to argue that reasonable suspicion supporting his traffic stop was terminated at the point when the stop became a detention after the allegedly racially charged statements by Bieber. In other words, Lockett argues that the stop morphed from a *Terry* traffic stop to a baseless and unconstitutional seizure in retaliation for his questioning of Bieber's statement. He also argues that the three searches performed on him by the MP Defendants violated *Terry*.[25]

Whether a traffic stop constitutes a violation of a person's Fourth Amendment rights is analyzed under the standard announced in *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *United States v. Brigham*, 382 F.3d 500, 506-07 (5th Cir. 2004). The analysis considers (1) "whether the officer's action was justified at its inception"; and (2) "whether the officer's subsequent actions were reasonably related in scope to the circumstances that justified the stop." *Brigham*, 382 F.3d at 506. Under *Terry*, "[o]nce an officer's suspicions have been verified or dispelled, the detention must end unless there is additional articulable, reasonable suspicion" to justify continued detention. *United States v. Grant*, 349 F.3d 192, 196 (5th Cir. 2003). Furthermore, in the context of a Terry-type traffic stop and consistent with the Fourth Amendment's prohibition of unreasonable searches and seizures, an officer may perform a brief frisk of the driver if the frisk is based on reasonable suspicion that the driver may be armed and dangerous. *Arizona v. Johnson*, 129 S. Ct. 781, 172 L. Ed. 2d 694 (2009). "There is no Terry violation if the searching officer can point to specific and articulable facts suggesting actual physical risk to himself or others." *United States v. Sykes*, 2006 U.S. Dist. LEXIS 80322, 2006 WL 3193745, *5 (E.D. La. Nov. 6, 2006). In any event, "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Grant*, 349 F.3d at 196 (quoting *Florida v. Royer*, 460 U.S. 491, 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983)). Likewise, a Terry-type detention "must be temporary and last no longer than is necessary to effectuate the purpose of the stop, unless further reasonable suspicion, supported by articulable facts, emerges." *United States v. Brigham*, 382 F.3d 500, 507 (5th Cir. 2004).

The Fifth Circuit, "following the Supreme Court, has treated routine traffic stops, whether justified by probable cause or a reasonable suspicion of a violation, as *Terry* stops." *Brigham*, 382 F.3d at 506. [26] In assessing whether a detention has lasted longer than necessary, the Fifth Circuit examines "whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant." *United States v. Thibodeaux*, 276 Fed. Appx. 372, 375 (5th Cir. 2008) (citing *United States v. Sharpe*, 470 U.S. 675, 686, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985)). Under *Terry*, the Fifth Circuit has recognized that certain activities, including "requesting documents such as driver's licenses, registrations, or rental papers; running a computer check on those documents; and asking questions about the purpose and itinerary of a driver's trip," are all appropriate within the scope of the *Terry*-type traffic stop. *Id.* In this analysis, as in any Fourth Amendment inquiry, reasonableness is the "touchstone," as determined in the totality of the circumstances. *Brigham*, 382 F.3d at 507.

In this case, the Court finds, in the totality of the circumstances, that Lockett's detention was not of an unreasonable duration, in the totality of the circumstances, to constitute an *illegal seizure* under *Terry* and its progeny. First, the events during the initial scope of the stop, in light of its probable cause basis resulting from Lockett's traffic violations, were preliminarily within the admissible range of activities allowed under the Fifth Circuit's Terry jurisprudence.

After Lockett pulled over, Bieber approached the vehicle and asked him various questions about where he was going and whether there was an emergency. During this initial exchange, Bieber made the allegedly racially charged statement that prompted Lockett to dial 911 and request the presence of the NOPD. In the meantime, Arceneaux had approached the vehicle and asked Bieber for his license, registration, and proof of insurance. All these initial procedures were well within the permissible scope of a Terry-type traffic stop. However, after Locket procured the dispatch of NOPD officers by his 911 call, Bieber and Arceneaux called their supervisor Ahner to report the clearly escalating situation. At this point, the continued duration of the initial stop was the result of Lockett's own involvement of the NOPD. The Fifth Circuit in Thibodeaux noted that if a Terry-type stop continues for reasons beyond the officer's control and resulting from the detainee's own actions, the extended duration may not violate the principles of Terry. 276 Fed. Appx. at 375 (noting that detainee's own evasive and inconsistent answers necessitated the continuation of the initial stop). Additionally, while the MP Defendants initial suspicions regarding Lockett's traffic violations may have been verified or dispelled soon after the stop occurred, the involvement of the NOPD necessitated the prolongation of the stop. Likewise, there was the outstanding issue of Lockett's expired insurance card, which apparently was never resolved as a result of the escalation of the stop. In light of all these circumstances, the Court finds that the MP Defendants were initially justified in stopping Lockett, and likewise finds that the MP Defendants' subsequent actions prolonging the detention after the initial stop were reasonably related in scope to the circumstances that justified the stop.

However, the Court also concludes that the various frisks and/or searches performed by the MP Defendants constituted *illegal searches* under *Terry*. The Court notes that there is no evidence whatsoever regarding whether Bieber, Arceneaux, or Ahner had any reasonable suspicion based on articulable facts to believe that Lockett was armed or dangerous during the course of the traffic stop so as to justify the Terry-type weapons pat-down. In fact, Bieber and Arceneaux even allowed Lockett to return to his vehicle after the two initial searches, which suggests that they did *not* have any reasonable suspicion to believe that Lockett was armed. See *Estep v. Dallas County, Tex.*, 310 F.3d 353, 360 n.7 (5th Cir. 2002) (finding that defendant officer performed an illegal passenger compartment search under Terry based in part on the fact that his "contention that he was truly in fear for his safety [was] belied by the fact that he never searched [the detainee's] person for weapons"). In this regard, the present case is similar to the circumstances of Sykes, in which the court held that a pat-down search incident to a traffic stop for failure to signal lane change and erratic driving was not justified by reasonable suspicion. 2006 U.S. Dist. LEXIS 80322, 2006 WL 3193745 at *6-7. Although the initial stop was justified by the traffic violation, the Sykes court held that the officer's testimony that the detainee was "nervous and shaking and sweaty" did not rise to the level of specific articulable facts and appropriate inferences to support a reasonable suspicion that the detainee was armed. *Id.* In this case, there is no testimony or evidence *whatsoever* regarding any grounds for reasonable suspicion by the MP Defendants that Lockett was armed and dangerous. While Arceneaux did testify that he frisked Lockett because he "was very worked up" and "might become angry to the point of combativeness," this vague testimony does not support reasonable suspicion that Lockett was armed to support a Terry frisk. Rec. Doc. 51-4, p.84-85. Additionally, Ahner's testimony regarding his pat-down search of Lockett is devoid of any mention whatsoever of a concern regarding the possible presence of a weapon. Rec. Doc. 51-7, pp.72-73.

As such, Lockett does state a claim under § 1983 and *Terry* based on the various searches during the traffic stop, and thus satisfies the first prong of the *Saucier/Pearson* test. However, as noted earlier, this does not end the qualified immunity analysis. The second step of the Saucier/Pearson test requires a court "to ask whether the contours of the constitutional right in question were sufficiently clear that a reasonable officer would understand that what he is doing violates that right." *Estep,* 310 F.3d at 360.

The Fifth Circuit has held, in the context of a Terry vehicle frisk incident to a speeding stop in which the officer had no reasonable suspicion in the circumstances to believe that the detainee was armed, that such a "constitutional violation . . . is clear-cut and obvious [because] . . . [n]o reasonable police officer could have really believed that a search was constitutional under the circumstances presented." *Id.* at 361; see also *James v. Sadler*, 909 F.2d 834, 838 (5th Cir. 1990) ("The right to be free from an unreasonable pat-down search is a constitutional right sufficiently contoured to remove the defendant's actions from the protection of the immunity doctrine."). However, the circumstances of this case are crucially different from those at issue in *Esteps* based on the fact that the MP Defendants *had probable cause to arrest* Lockett based on *multiple traffic violations*. The Supreme Court in Berkemer and the Fifth Circuit in Brigham have both recognized that a traffic stop supported by probable cause may, in some circumstances which neither court elaborated upon, exceed the bounds set by the Fourth Amendment on the scope of a Terry stop. Thus, the delineation between the permissible scope of "officer safety" frisks under Terry in the context of *reasonable suspicion* traffic stops for minor or solitary traffic violations, and the scope of frisks incident to a *probable cause* traffic stop for arrestable violations, is not clearly defined.

In fact, the Fifth Circuit has upheld patdown searches in the context of probable cause traffic stops based on little more than the officer's testimony that the defendant gave suspicious answers to questions and immediately exited his vehicle after stopping. *United States v. Huerta*, 252 Fed. Appx. 694, 695-96 (5th Cir. 2007). In Huerta, the defendant was stopped for a minor speeding violation, and the Fifth Circuit found that there was probable cause for the officer to initiate the stop based on his witnessing the violation. *Id.* Additionally, the Huerta court affirmed the district court's finding that the officer's pat-down search of the defendant was justified based on concerns of officer safety. *Id.* Specifically, the court found that the defendant's answers to the officer's preliminary post-stop questions were suspicious, and that the defendant immediately approached the officer after the stop, all of which constituted sufficient grounds for the pat-down search related to safety concerns. *Id.* Similarly, in this case, there is some testimony that Lockett initially identified himself as an FBI agent. [27] Regardless of whether this initial mis-identification was the result of a misunderstanding or confusion, the possibility that Lockett was improperly identifying himself as a law enforcement officer, especially at such an early stage of the stop, would clearly have been of some concern to the MP Defendants vis-a-vis their safety. This initial concern, combined with the escalating nature of the stop as described by both Arceneaux - who indicated that Lockett "was very worked up" and "might become angry to the point of combativeness" - as well as by Lockett himself - who testified that when he called 911 "the situation look[ed] like it [was] getting out of hand" - resulted in the MP Defendants' reasonable concern for their safety, which in turn prompted the frisks.

Given the unique circumstances of this case, as well as the expressly open question in the Fifth Circuit of whether and to what extent the strictures of Terry apply to probable cause traffic stops for arrestable offenses, the Court finds that the MP Defendants are entitled to qualified immunity as to Lockett's *illegal search* claims under Terry, as the right at issue was not clearly established in light of the circumstances of this case. The Fifth Circuit has noted that "[q]ualified immunity allows for officers to make reasonable mistakes about whether their conduct violates the law, and an officer's mistake is reasonable when there are insufficient indicia that the conduct in question was illegal." *Lytle v. Bexar County, Tex.*, 560 F.3d 404, 410 (5th Cir. 2009). In this case, the Court finds that any mistake by the MP Defendants in frisking Lockett was reasonable given the events of the stop and the uncertainty of the law regarding the permissible scope of probable cause traffic stops. Accordingly, the MP Defendants motion for summary judgment on Lockett's *illegal search* claims should also be granted.

2) § 1985 and § 1986 Claims

The MP Defendants argue that Lockett's claims under § 1985(3), asserting that they and NOPD Officer Fletcher conspired to deprive him of constitutional rights, fail as a matter of law and fact, which in turn renders his § 1986 claims invalid.

"To state a claim under 42 U.S.C. § 1985(3), a plaintiff must allege: (1) a conspiracy involving two or more persons; (2) for the purpose of depriving, directly or indirectly, a person or class of persons of the equal protection of the laws; and (3) an act in furtherance of the conspiracy; (4) which causes injury to a person or property, or a deprivation of any right or privilege of a citizen of the United States." *Hilliard v. Ferguson*, 30 F.3d 649, 652 -653 (5th Cir. 1994). Furthermore, "to prevail under that statute, [plaintiff] must prove a discriminatory animus based on race or some other inherited or immutable class characteristic such as gender, religion or national origin or based upon political association or beliefs." *Sullivan v. County of Hunt, Tex.*, 106 Fed. Appx. 215, 220 (5th Cir. 2004). Because a conspiracy under this section requires the involvement of two or more persons, a "corporation cannot conspire with itself any more than a private individual can." *Id.* In an action under § 1985(3), "specificity is required" in the context of pleading the operative facts of the conspiracy. *Holdiness v. Stroud*, 808 F.2d 417, 424 (5th Cir.1987). Likewise, "[t]he essence of a conspiracy is an understanding or agreement between the conspirators." *Id.*

The Court need not reach the question of whether the MP Defendants and Fletcher were members of the same corporate government entity, apropos of the NGTF and NOPD's joint task force operations, because Lockett's § 1985(3) claims fail on a much more fundamental basis. Specifically, the Court's reading of the present summary judgment record does not reveal any evidence that the MP Defendants conspired either among themselves or with Fletcher to deprive Lockett of his constitutional rights based on his race.

As an initial matter, the Court fails to see how the allegedly racially charged statement by Bieber to Lockett - which constitutes the foundation of all Lockett's race-related arguments - can in any way be facially interpreted as having a racial animus. First of all, the Court notes that Lockett's recollection of the substance of the statement conflicts with Bieber and Arceneaux's version of what was said. Lockett testified that, after he told Bieber that he was late for a class at SUNO, Bieber responded "You need to be at SUNO." Lockett subjectively interpreted this statement to be a derogatory reference to the fact that SUNO is an historically African-American University, and further extrapolated that this statement was meant to denigrate him as a student of that university. The Court fails to see how, on its face, even the version of the statement espoused by Lockett can be interpreted as racially charged in any objectively reasonable way. Furthermore, Bieber and Arceneaux both testified that Bieber did not simply say "You need to be at SUNO." Rather, both men testified that the substance of

Bieber's statement was in reference to the fact that Lockett admitted that he was late for class in response to Bieber's initial questions after the stop. Thus, Bieber and Arceneaux both testified that the statement at issue was intended to indicate that if Lockett were already at SUNO, as he was supposed to be for his class, he would not have had to speed. Specifically, Bieber testified as follows:

> Q. Did you give him the full sentence that "if you left your house sooner and done this and did all these other things, you would be there already" or you just simply said "you need to be at SUNO?"
>
> A. Yes, sir. I gave him the full statement. The only thing that he's saying is just that I said "you need to be at SUNO" but I think that was [sic] omitted everything what I had said.

Rec. Doc. 51-3, p.14. Likewise, Arceneaux indicated his similar recollection of Bieber's statement:

> Q. Was it made? Was the statement "you need to go to SUNO" made?
>
> A. A statement to the effect of either "you need to be at SUNO" or "you need to be going to SUNO" was made. I don't recall the exact wording of the phrase, but the meaning of the phrase I remember I took to mean if you were here at SUNO, you wouldn't be late and you wouldn't have been speeding on Hayne.

Rec. Doc. 51-4, p.83. The Court does not make any determination as to which version of Bieber's statement is the most accurate, and in the end the true version of the statement may never be established. The Court merely points to the various versions and explanations of that statement to emphasize that *there is no facially apparent racial animus* in any version of the statement on which Lockett bases his claims.

In light of this finding, Lockett's § 1985(3) conspiracy claim fails, as there is no other evidence in the present record regarding any conspiracy to deprive him of his constitutional rights *based on his race*. While the MP Defendants and Fletcher relied on each other in concluding that Lockett had committed the offenses of speeding, running a red light, and running a stop sign, which might arguably suggest some agreement among them as to the proper charges against Lockett, that agreement was devoid of any racial animus as the record now stands. Furthermore, and as discussed at further length above, Lockett's speculative arguments regarding whether the MP Defendants fabricated traffic violations to justify their actions are insufficient to support any of his claims, and in any event do not indicate any racial animus in and of themselves and in absence of Bieber's disputed statement. In sum, there is no evidence that the MP Defendants and/or Fletcher entered into any understanding or agreement to deprive Lockett of his civil rights *with a racial animus*. As such, the MP Defendants are entitled to dismissal of Lockett's § 1985(3) claims on the present summary judgment record.

As a result, Lockett's § 1986 claims also fail. "In the absence of a claim under section 1985, [plaintiff] obviously cannot sustain a claim under section 1986," which merely provides a cause of action against "[e]very person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 . . . are about to be committed, and having power to prevent or aid ... neglects or refuses so to do." *Galloway v. State of Louisiana*, 817 F.2d 1154, 1159 n.2 (5th Cir. 1987). Therefore, the MP Defendants and Thomas are also entitled to dismissal of Lockett's claims under § 1986 on the present summary judgment record.

3) Supplemental State Law Claims and Immunity Grounds

As an initial matter, the Court finds, in accordance with the analysis applicable to Lockett's § 1983 excessive force claims, that the MP Defendants are entitled to summary judgment as a matter of law and fact as to Lockett's state law claims of assault and battery. See *Gerard v. Parish of Jefferson*, 424 So.2d 440, 444 (La. App. 5 Cir. 1982) ("A lawful arrest is a defense to the intentional tort of battery when reasonable force is used to effect such an arrest.") (citing *Kyle v. City of New Orleans*, 353 So.2d 969, 972 (La. 1977).

Likewise, Lockett's state law claims for false arrest, false imprisonment, and malicious abuse of process are subject to summary dismissal based on the same analysis discussed above. . "Under Louisiana law, the torts of false arrest and malicious prosecution both require malice as an essential element." *Jenkins v. Baldwin*, 801 So.2d 485, 497 (La. App. 4 Cir. 2001) (citing *Morin v. Caire*, 77 F.3d 116 (5 Cir.1996)). Similarly, the tort of abuse of process requires an "ulterior motive." *Morin*, 77 F.3d at 122. "Malice may be inferred from a lack of probable cause, or from a finding that the defendant acted recklessly." *Id.* As discussed in the analysis of Lockett's federal claims, the present record does not support any showing of malice or ulterior motive on the part of the MP Defendants, and thus the MP Defendants are entitled to summary judgment on these claims as well.

The MP Defendants and Thomas additionally argue that they are entitled to immunity on various statutory grounds from the remainder of Lockett's pendent state law claims. [28] The Court will address each in turn.

a) § 9:2798.1

The MP Defendants and Thomas invoke immunity against Plaintiff's supplemental state law claims under § 9:2798.1, which provides:

> A. As used in this Section, "public entity" means and includes the state and any of its branches, departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, employees, and political subdivisions and the departments, offices, agencies, boards, commissions, instrumentalities, officers, officials, and employees of such political subdivisions.
>
> B. Liability shall not be imposed on public entities or their officers or employees based upon the exercise or performance or the failure to exercise or perform their policymaking or discretionary acts when such acts are within the

> course and scope of their lawful powers and duties.
>
> C. The provisions of Subsection B of this Section are not applicable:
>
> (1) To acts or omissions which are not reasonably related to the legitimate governmental objective for which the policymaking or discretionary power exists; or
>
> (2) To acts or omissions which constitute criminal, fraudulent, malicious, intentional, willful, outrageous, reckless, or flagrant misconduct.

La. Rev. Stat. Ann. § 9:2798.1. In sum, § 9:2798.1 provides immunity to state officials for discretionary acts. Section 9:2798.1 "does not protect against legal fault or negligent conduct at the operational level, but only confers immunity for policy decisions; i.e. decisions based on social, economic, or political concerns." *Saine v. City of Scott*, 819 So. 2d 496 (La. App. 3 Cir. 2002) (citing Chaney v. Nat. R.R. Passenger Corp., 583 So. 2d 926, 929 (La. App. 1 Cir.1991)). Thus, "[t]he exception protects the government from liability only at the policy making or ministerial level, not at the operational level." *Fowler v. Roberts*, 556 So. 2d 1, 15 (La.1989). In Fowler v. Roberts, 556 So. 2d 1 (La.1989), the Louisiana Supreme Court concluded that the discretionary acts immunity established by section 9:2798.1 is essentially the same as the discretionary acts exception to the Federal Tort Claims Act. *Id.* at 15. Consequently, the court adopted the Supreme Court's two-prong Berkovitz test for determining whether the exception applies. *Id.* Under this test, the court should first determine whether the state employee had an element of choice or whether he violated a statute, regulation, or policy specifically prescribing a mandatory course of action. If the employee did not have an element of choice, then the immunity does not apply. *Id.* If the act was discretionary (no mandatory policy was violated), then the court must next determine whether the discretionary act was related to public policy considerations. *Id.*

The Court finds that § 9:2798.1 immunity does not apply to the MP Defendants in the circumstances of the present case, insofar as their conduct was not related to any policy decision, but rather implicated operational concerns. [29] Additionally, given the dearth of treatment regarding the applicability of § 9:2798.1 to the claims against Thomas, the Court also finds that summary judgment on Thomas's immunity should be denied, as it is unclear whether Thomas is entitled to the immunity as a matter of law. However, as discussed at length below, the remaining claims against Thomas fail as a matter of law, and thus the issue of immunity as to Thomas is moot. [30]

b) National Guard Immunity under §29:23 and 29:23.1

The MP Defendants cite grounds for immunity to Lockett's state law claims in the provisions of § 29:23:

> No officer or other member of the military forces of this state shall be indicted, prosecuted, or sued for any injury to any person or property performed or committed by him while in the

> active service of the state of Louisiana in the course of the business of the military forces of this state as required of him by this Part.

La. Rev. Stat. Ann. § 29:23. The parties have not cited, and the Court has not located, any relevant jurisprudence construing the scope and applicability of the immunity provided under § 29:23.

Plaintiffs have cited the provisions of § 29:23.1 in opposition to the MP Defendants' claims of immunity under § 29:23.1. Specifically, Plaintiffs note the following language in § 29.23.1:

> That the intent of this Section is to relieve the state and the National Guardsman from liability only where the National Guardsman is an employee of the United States of America for purposes of respondeat superior liability under the Federal Tort Claims Act as provided in 28 U.S.C. 2671 et seq. This Section is not intended to prevent Civil Code Article 2320 or other such laws from imposing master-servant liability on the state, or to prevent Civil Code Articles 2315 et seq. generally from imposing liability in circumstances to which such codal articles and/or laws would otherwise impose liability for damages caused by the offenses or quasi offenses of members of the National Guard committed within the course and scope of their National Guard duties when the Federal Tort Claims Act does not apply.

La. Rev. Stat. Ann. § 29:23.1(A)(6). This provision, however, is part of a section entitled "Nonimposition of liability for acts of national guardsmen on **duty or training**," and by its own terms only applies to causes of action arising against national guardsmen engaged in training or duty *pursuant to federal law*, "but not activated to become part of the federal forces as such." *Id.* at § 29:23.1(A)(1) (emphasis added). Furthermore, this section only addresses the immunity of the state and individual guardsmen in situations arising under the Federal Tort Claims Act. *Id.* at § 29:23.1(A)(6).

It is true that the language of § 29:23.1(A)(6) seems to be in conflict with the blanket immunity afforded active duty guardsmen under § 29:23. Specifically, the phrase "within the course and scope of their National Guard duties" in § 29:23.1 - which indicates that the immunity from FTCA claims does not extend to state law, non-FTCA claims - appears to conflict with the provision of § 29:23 which immunizes guardsmen from *any* suit arising from his "active service of the state of Louisiana in the course of the business of the military forces of this state." The resolution of this apparent conflict lies in the context of the remaining provisions of § 29:23.1(A) as well as the history of § 29:23. As noted earlier, § 29:23.1 applies by its own terms solely to causes of action arising during the *training* and *non-active duty* of national guardsmen. Furthermore, the history of § 29:23 underscores this crucial difference in the scope of each section. The predecessor statute to § 29:23 was § 29:31, which provided that "[n]o officer or other member of the military forces in this state shall be indicted, prosecuted, or sued for any injury to person or property while performing or attempting to perform any duty required of him by this Part." *Marler v. State*, 78 So.2d 26, 35 (La. App. 1955). The Marler court held that

> This section absolves members of the National Guard from liability for their acts **when they have been ordered by the Governor into active service** in the event of insurrection, invasion, riot, or imminent danger thereof, or in the event of public disaster or danger from floods, fire, storm or earthquake, or to assist the civil authorities in guarding prisoners. It has no application otherwise to members of the National Guard, such as while on two weeks' training tour

Id. (emphasis added). The Marler court went to cite the Louisiana Supreme Court's holding in State v. Josephson:

> But, manifestly, the statute contemplates two kinds of 'active service'-the 'active service' which follows upon call of the Governor, and the 'active service' which consists in merely being a member of the organization in good standing. The former withdraws the militiamen from the jurisdiction of the civil courts; the latter does not. In fact, the contention that a member of the militia is all the time not amenable to the powers of the courts can hardly be serious.

Id. (citing *Josephson*, 45 So. 381, 434, 120 LA. 433 (La. 1908)). Thus, given the history of § 29:23, the *absolute* immunity afforded guardsmen *during active duty on behalf of the State* is fundamentally different from the partial immunity and exceptions to that immunity provided in § 29:23.1, which concerns only *non-active* duty and training periods. Besides the fact that history and context support this distinction, this conclusion is also the only way that the provisions of § 29:23 and §

29:23.1(A)(6) - which are admittedly confusing on their face - can be reconciled.

Based on this analysis, the Court finds that, since the MP Defendants were engaged in active service by order of the Governor of Louisiana, [31] they are entitled to immunity as to all Plaintiffs' state law claims against them in their individual capacities. [32] Furthermore, the Court agrees with the MP Defendants that Plaintiffs' reliance on § 29:23.1 to defeat the MP Defendants' immunity is misplaced. First of all, it is apparently undisputed that the Task Force Gator operations, under which the MP Defendants were deployed to engage in law enforcement in New Orleans, were authorized under Louisiana law pursuant to the Governor's power as commander in chief of Louisiana's national guard. See Rec. Doc. 51-14. As such, the operations of the MP Defendants were clearly active duty operations triggering § 29:23 immunity, not training or non-active duty operations that would implicate the exception to immunity provided in § 29:23.1(A)(6).

Furthermore, Plaintiffs' reliance on *Giardina v. Lawrence*, 2009 U.S. Dist. LEXIS 36432, 2009 WL 1158857 (E.D. La. Apr. 29, 2009), is misplaced. Giardina involved, in part, claims against a national guardsman who shot the plaintiff during an arrest by the NOPD. 2009 U.S. Dist. LEXIS 36432, [WL] at * 1. The guardsman defendant initially cited § 29:23 immunity in a motion to dismiss, which the court denied based on (1) the defendant's failure to provide orders indicating that he was in fact a member of the national guard entitled to the immunity at the time of the incident; and (2) the defendant's failure to address the applicability *vel non* of § 29:23.1 in his motion. See Giardina v. Lawrence, Civil Action No. 07-6578, Rec. Doc. 20, p. 2. In response to the guardsman's initial motion to dismiss, the Giardina court "agree[d] that there does not appear to be a lot of jurisprudence on this issue presented here, and [did] not intend to make a finding on its applicability in this matter," thus refusing to "address the merits of any claim or defense based on either section." *Id.*

After the initial denial of his motion to dismiss on immunity grounds, the guardsman defendant filed a motion for judgment on the pleadings and/or summary judgment on the same § 29:23 grounds. *Giardina*, 2009 U.S. Dist. LEXIS 36432, 2009 WL 1158857 at *1. The Giardina court noted its previous rejection without prejudice of the guardsman's immunity defense, and pointed out that, despite the concerns raised in its previous order, the guardsman had still not presented authentic copies of his national guard orders and the parties had still not adequately addressed the interplay between § 29:23 and § 29:23.1. 2009 U.S. Dist. LEXIS 36432, [WL] at *2. As such, the Giardina court again refused to address the issue of liability and immunity. *Id.* Therefore, the *Giardina* court never addressed the applicability of or relationship between the two statutory provisions regarding national guard immunity, and the decision does not affect this Court's conclusion.

Finally, this Court has previously commented, although only tangentially, on § 29:23.1. See *Alfonso v. Military Dept.*, 2007 U.S. Dist. LEXIS 84984, 2007 WL 4114438, *5 (E.D. La. Nov. 15, 2007). Alfonso involved plaintiffs' personal injury claims *against the State of Louisiana* arising from a car accident allegedly caused by a mud slick on the roadway resulting from national guard operations after Hurricane Katrina. 2007 U.S. Dist. LEXIS 84984, [WL]at *1. At issue in this Court's decision was plaintiffs' motion to remand, which the Court ultimately granted. The State, through its Military Department, removed the suit from state court, arguing that "since the allegations contained in [plaintiffs'] complaints occurred during the time when the Louisiana National Guard had been activated pursuant to the Executive Order of the Governor of Louisiana, the Louisiana National Guardsmen were operating in a federal status under 32 U.S.C. 101 et seq., and thus, according to Defendant, a federal question exists" because plaintiffs' claims were only proper under the FTCA. 2007 U.S. Dist. LEXIS 84984, [WL] at *3. In addition to this argument in support of its federal question removal, the State also cited § 29:23.1 for the proposition that the statute "was enacted to relieve the state of Louisiana and the National Guardsmen from liability where the National Guardsman is an employee of the United States of America, for purposes of respondeat superior liability." 2007 U.S. Dist. LEXIS 84984, [WL] at *4 In support of their motion to remand, plaintiffs argued that there was no FTCA claim at issue, as they had only sued the *State* and not the United States. 2007 U.S. Dist. LEXIS 84984, [WL] at *4. Without addressing these substantial underlying jurisdictional questions, the Court remanded the case based on the failure of the State *ex rel* the Military Department to join the Department of Transportation and Development in the removal, as well as the untimeliness of the removal petition. 2007 U.S. Dist. LEXIS 84984, [WL] at *7.

Unlike *Alfonso*, no party has argued in this case that the non-constitutional tort claims against the MP Defendants arise under the FTCA or are anything other than Louisiana tort claims. Stated differently, no party has argued that the MP Defendants were acting in any capacity other than their capacity as active duty guardsmen *of the State of Louisiana*. Thus, besides the fact that this Court's decision in Alfonso did not even address the applicability of § 29:23.1, the posture of this case is completely different, as there is no question that Plaintiffs' tort claims arise under Louisiana law and not the FTCA. Thus, as noted previously, § 29:23.1 is inapplicable to this case. Accordingly, the MP Defendants are entitled to the absolute immunity from suit provided by § 29:23, as Plaintiffs claims undisputedly arose out of their actions taken in the active service of the State of Louisiana in the course of the business of the military forces of the State.

Based on the finding of immunity under § 29:23, the Court will not address the MP Defendants arguments under Louisiana Revised Statutes § 29:735(A)(1).

4) Mrs. Lockett's Claims under Art. 2315.6

Mrs. Lockett asserts claims against the State Defendants of intentional infliction of emotional distress under Article 2315.6 of the Louisiana Civil Code, which provides a cause of action for so-called "bystander" emotional damages. Article 2315.6 allows a spouse "who view[s] an event causing injury to [her spouse], or who come[s] upon the scene of the event soon thereafter, [to] recover damages for mental anguish or emotional distress that [she] suffer[s] as a result of [her spouse's] injury." La. Civ. Code Art.

2315.6(A). However, the injured spouse "must suffer such harm that one can reasonably expect a person in the claimant's position to suffer serious mental anguish or emotional distress from the experience, and the claimant's mental anguish or emotional distress must be severe, debilitating, and foreseeable." *Id.* at 2315.6(B). The Louisiana Supreme Court has noted that "[a] historical review of cases allowing recovery of bystander damages shows that bystander damages are intended to provide a remedy when severe mental distress arises directly and immediately from the claimant's observing a traumatic injury-causing event to the direct victim." *Trahan v. McManus*, 728 So.2d 1273, 1279 (La. 1999). The Trahan court further explained that "the Legislature apparently intended to allow recovery of bystander damages to compensate for the immediate shock of witnessing a traumatic event which caused the direct victim immediate harm that is severe and apparent, but not to compensate for the anguish and distress that normally accompany an injury to a loved one under all circumstances." *Id.* Thus, the bystander damage inquiry "focus[es] on whether [the bystander claimant] experienced severe and debilitating distress specifically from the **shock caused by the perception of the especially horrendous event.**" Id. (emphasis added) (internal quotations omitted).

The Court finds that the facts of this case do not give rise to a cause of action under Article 2315.6 because the injurious event was not sufficiently disturbing such that a person in Mrs. Lockett's position would reasonably suffer severe and debilitating emotional distress. As an initial matter, the Court notes its previous finding that there was no severe *physical* injury to Lockett as a result of the events of this case. In any event, any alleged injury to Lockett's wrists would not constitute the type of *physical injury* that would reasonably cause Mrs. Lockett severe debilitating emotional distress. Furthermore, there is no allegation, much less any record evidence, that any alleged distress experienced by Mrs. Lockett was severe and debilitating. Finally, while witnessing her husband's detention and arrest was likely a disturbing experience, the Court finds that it was not sufficiently shocking or horrendous to warrant bystander damages

The Court finds support for this conclusion in *Irvin v. Foti*, 1999 U.S. Dist. LEXIS 11515, 1999 WL 504916 (E.D. La. 1999), in which the court denied a mother's claims for bystander damages under Article 2315.6 based on the mother's witnessing of her daughter's arrest, which eventually led to the daughter's death in jail due to complications of diabetes. 1999 U.S. Dist. LEXIS 11515, [WL] at *1. In denying the claim for bystander damages, the Irvin court held that witnessing an arrest in and of itself cannot give rise to a claim under Article 2315.6:

> The court has no doubt that [plaintiff] has suffered greatly because of what happened to her daughter. However, witnessing the arrest of a child, while traumatic, is simply not the kind of injury contemplated by Art. 2315.6. Unlike Lejeune, where the plaintiff came upon the scene of a horrific injury to her husband immediately after it occurred, the plaintiffs here witnessed an upsetting but routine event - an arrest - but not the real cause of the injury, which was the police department's alleged failure to give [the

> daughter] her insulin shots and her untimely death as a result.

1999 U.S. Dist. LEXIS 11515, [WL] at *5. Mrs. Lockett attempts to distinguish Irvin by pointing out the court's suggestion that if the plaintiff mother had known contemporaneously with the arrest that her daughter would die, then she might have a claim under Article 2315.6. Based on this statement in Irvin, Mrs. Lockett argues that she was contemporaneously aware of her husband's handcuffing, the racial discrimination to which he was subjected, and the embarrassment and anxiety he endured. This argument misses the crux of the Article 2315.6 analysis - which the Louisiana Supreme Court has described as "whether [the bystander claimant] experienced severe and debilitating distress specifically from the **shock caused by the perception of the especially horrendous event.**" *Trahan*, 728 So. 2d at 1279. As noted earlier by this Court, and as confirmed by the decision in Irvin, "witnessing an arrest of a [relative], while traumatic, is simply not the kind of injury contemplated by Article 2315.6." While the Irvin court went on to elaborate on this statement relevant to the specific facts of that case, the statement is also true in this case. As such, the State Defendants' motion for summary judgment as to Mrs. Lockett's claims under Article 2315.6 should be granted.

The Court also notes that Lockett has himself asserted claims for intentional infliction of emotional distress under Louisiana law. In order to recover for intentional infliction of emotional distress under Louisiana law, a plaintiff must demonstrate (1) that the conduct of the defendant was extreme and outrageous; (2) that the emotional distress suffered by the plaintiff was severe; and (3) that the defendant desired to inflict severe emotional distress or knew that severe emotional distress would be certain or substantially certain to result from his conduct. *White v. Monsanto Company*, 585 So.2d 1205, 1209 (La.1991). "Conduct which is merely tortuous or illegal does not rise to the level of being extreme and outrageous." *Nicholas v. Allstate Ins. Co.*, 765 So.2d 1017, 1025 (La. 2000). Based on the Court's previous extensive analysis of Lockett's various claims in this case, there is no evidence in the present record to indicate that the conduct of the State Defendants was "extreme and outrageous" or that any of the State Defendants "desired to inflict emotional distress" or knew that such distress would occur in the circumstances. As such, Lockett's claims for intentional infliction of emotional distress also fail as a matter of law and fact, and should be dismissed. Likewise, for the same reasons discussed at length in this opinion, Lockett's claims for loss of reputation, humiliation, embarrassment, and pain and suffering should be dismissed as a matter of law.

For these reasons, all Plaintiffs' claims against the State Defendants fail as a matter of law on the present summary judgment record. Accordingly,

IT IS ORDERED that the State Defendants' **Motion to Dismiss Pursuant to FRCP 12(b)(1) (Rec. Doc. 47)** as to Plaintiff's claims asserted against them in their official capacities is hereby **GRANTED**.

IT IS FURTHER ORDERED that the State Defendants' **Motion for Summary Judgment (Rec. Doc. 48)** as to Plaintiff's federal and state law claims asserted against them in their individual capacities is likewise **GRANTED**.

IT IS FURTHER ORDERED that all Plaintiff's claims against the State Defendants' in their official capacities are hereby **DISMISSED WITHOUT PREJUDICE** under the Eleventh Amendment, with the exception of Plaintiffs' claims for prospective injunctive relief against Governor Jindal, which are **DISMISSED WITH PREJUDICE** under City of Los Angeles v. Lyons.

IT IS FURTHER ORDERED that all Plaintiff's claims against the State Defendants' in their individual capacities are hereby **DISMISSED WITH PREJUDICE** in light of the above rulings.

New Orleans, Louisiana, this **26th** day of **June**, 2009.

/s/ Carl J. Barbier

CARL J. BARBIER
UNITED STATES DISTRICT JUDGE
June 26, 2009, Decided
June 26, 2009, Filed

Footnotes

1 There is much made in the parties' briefing regarding the conflicting evidence as to whether and by how much Lockett was exceeding the speed limit. The State Defendants assert in their memoranda that Bieber and Arceneaux paced Lockett - i.e. determined his speed relative to the speed of their own vehicle and without any electronic speed recording equipment - driving in

excess of 45 m.p.h. Rec. Doc. 48-1, p. 2. However, Lockett's deposition indicates that Lieutenant Fletcher of the NOPD initially informed him that the MP Defendants had reported his speed at over 100 m.p.h. See Rec. Doc. 51-1, p. 65. Additionally, Mrs. Lockett's hand-written notes from the day of the arrest indicate that Fletcher and Ahner told her that Lockett had been traveling at 90 m.p.h. Rec. Doc. 51-10, p. 3. Fletcher's own testimony recounted that the MP Defendants reported that Lockett was going as fast as 90 m.p.h. and at least over 70 m.p.h. See Rec. Doc. 51-17, p. 45. Additionally, Lockett notes Bieber and Arceneaux's testimony that he was driving at 75 m.p.h. Rec. Doc. 51-3, p. 27; 51-4. p. 94. The Court acknowledges these discrepancies, but also notes that Lockett has not at any point denied that he was speeding.

2 The following excerpt from Lockett's testimony more fully explains his allegation that Bieber's statement was racially charged:

> Q. So he gestures toward the FBI building, your statement says that you said, "no, sir, I'm going to class at SUNO, and then Bieber yells at you, "you need to go to SUNO"?
> A. Yes, Sir
> Q. And you have in your statement the word "need" in boldface. Why do you have the word "need" in boldface?
> A. That's the word that hee emphasized.
> Q. Okay, and I realize this isn't going to be clear for the record, but just for my edification can you do it like he said it to you?
> A. Sure, "You need to go to SUNO."
> Q. All right. And then what did you say?

A. "What exactly do you mean by that?"

Q. When you say in your statement that you asked him what he meant by that statement and he yelled at you to get out of the vehicle, you don't put that in quotes, so what I'm asking you to tell me is exactly what did you say in response to him saying "you need to go to SUNO"?

A. What do you mean by that?"

Q. Okay. Did you yell -- did you raise your voice –

A. No, sir.

Q. -- at that point?

A. No, sir.

Q. What did you think he meant by it?

A. It was clear that he was insinuating that SUNO was an institution that was not of standard learning but substandard learning for whatever particular reason that he felt that SUNO was an institution for substandard learning.

Q. How do you extrapolate that meaning from "you need to go to SUNO"?

A. It was clear that he was insinuating that SUNO was the place that I should be with him suggesting that I was an individual who did not have enough understanding to attend a university that was of a normal standard.

Q. Were there any implications that you drew from his comment?

A. From the comment?

Q. The comment, "you need to go to SUNO," were there any other implications that you drew from that besides what you just told me?

A. I was able to draw that SUNO being African-American university and him telling me that I need to go there as a substandard school that obviously he was insinuating that an African-American school was a substandard school.

Q. Are you African-American?

A. Yes, sir.

Q. Are there any other races in your background that are -- are there any other races in your background?

A. Yes, sir.

Q. Which are they?

A. Unique New Orleans mix. I would not be certain of everything.

Q. Creole; is that right?

A. Yes, sir.

Rec. Doc. 51-1, Exhibit A, Lockett's Deposition Testimony, pp. 22-24.

3 While Lockett testified that Bieber frisked him at this point, Bieber's testimony indicates that only Arceneaux frisked him during the initial stages of the stop. Rec. Doc. 51-3, p. 37.

4 Arceneaux, who was also initially on the scene and overheard Bieber's conversation with Lockett, corroborates Bieber's contention that he did not simply say "you need to be at SUNO," but rather said something to the effect of "you need to be at SUNO" or "you need to be going to SUNO" with the intended meaning that if Lockett were actually at SUNO at the time of the stop, he would not have been late and would not have need to speed. Rec. Doc. 51-4, p.83.

5 Lockett testified at deposition that he called GEICO, his insurer, and offered to have the operator speak with Bieber regarding his coverage. Bieber indicated that

the information should be faxed. Ultimately, the information was not faxed and Lockett hung up with GEICO prior to calling 911. Incidentally, Lockett testified that the GEICO operator herself noted Bieber's allegedly angry tone in the background of her conversation with Lockett. Rec. Doc. 51-1, pp. 29-32.

6 According to the State Defendants, the 911 call record indicates that Lockett's 911 call was made at 9:13 a.m. However, Lockett testified at deposition that he did not call 911 for approximately ten to fifteen minutes after he was pulled over. This time frame described by Lockett would be impossible if he were pulled over at 9:13 (as NOPD's radio records indicate) and also made his 911 call at 9:13 (as the 911 call record indicates). The import of this timing discrepancy concerns whether and to what extent Bieber's comments created or could have been interpreted to create a racially hostile environment, and whether Bieber's calling in of the traffic stop was in response to Lockett's comments regarding racial discrimination in his 911 call.

7 Melanie Locket is an associate attorney at the law firm of Lowe, Stein, Hoffman, Allweiss, & Hauver, L.L.P., which represents Plaintiffs in this case. However, contrary to the assertions of the State Defendants, Mrs. Lockett is not representing Mr. Lockett or herself in the present matter.

8 As for Lockett's speed prior to the traffic stop, Lockett points out that the various officers' estimation of his speed prior to being pulled over have conflicted since the beginning of this case, and have continued to change. See note 1 above. Fletcher testified that a reckless driving offense occurs if a driver operates a

vehicle 15-20 miles per hour over the speed limit, or if he commits multiple violations or endangers another person by his operation. Rec. Doc. 51-17, p.45. Lockett suggests that the changing rate of speed suggested at various times by the State Defendants indicates an attempt to improperly justify his arrest for reckless operation.

9 The Court has not located any Fifth Circuit cases directly addressing whether the Louisiana Air National Guard is entitled to Eleventh Amendment immunity. However, the Bryant case, although it involves employment law claims against the Mississippi Air National Guard, is analogous and persuasive authority. The Bryant court noted that "[b]ecause of the hybrid nature of the Guard, questions may arise as to whether the actions of the Guard and/or individual defendants were under color of state or federal law." 381 F. Supp 2d at 591 n.6. However, the court further noted that "the parties appear to agree, and the facts substantiate that [the Mississippi Air National Guard] is a state agency as to the matters at issue." *Id.* Likewise, the parties in this matter appear to agree that Ahner, Arceneaux, and Bieber were acting in their official capacity as members of the Louisiana Air National Guard, which was in turn acting under color of state law.

10 The Court also notes that, in their opposition to the State Defendants' motion for summary judgment, Plaintiffs concede that Thomas is a "state police officer." Rec. Doc. 51, p.29.

11 Although this issue was not raised by the parties, the Court also notes that according to "long and clearly

established Supreme Court precedent . . . neither a State nor its officials acting in their official capacities are 'persons' under § 1983," and thus neither a State nor its officials are amenable to suit under §§1983, 1985, or 1986. *Fairley v. Stalder*, 294 Fed. Appx. 805, 808-809 (5th Cir. 2008); *Bryant v. Military Dept. of State of Miss.*, 381 F. Supp. 2d 586, 592 (S.D. Miss. Aug. 26, 2005) (holding that "claims under §§ 1983, 1985 and 1986 are barred for the further reason that these statutes create rights solely against 'persons' and a state is not considered a 'person' under these statutes"). Thus, Plaintiffs' official capacity claims under §§1983, 1985, and 1986 fail for this reason as well as for the reasons discussed above.

12 See Donna Miles, *Guard Ends New Orleans Mission, Focuses on Wildfires, Snow*, Mar. 2, 2009, available at http://www.ngb.army.mil/news/archives/2009/03/030309-Guard.aspx.

13 The State Defendants argue for dismissal of Plaintiff's claims under 42 U.S.C. § 1981 on various legal grounds. However, Plaintiffs concede in their opposition that they have not and cannot state a claim for relief under § 1981, and thus consent to the summary dismissal of their claim under that section.

14 "Reckless operation" is defined in the New Orleans Code of Ordinances as "the operation of any motor vehicle . . . in a criminally negligent or reckless manner." New Orleans, La., Code of Ordinances §154-382.

15 As a clarification, Lockett only asserts claims under

§ 1985(3) against Ahner, Arceneaux, Bieber, and Fletcher, but not against the African-American NOPD officers - Thomas, Gains, and Clark - who were also involved in Lockett's arrest. See Compl. PLX

16 The Court notes that in addition to prohibiting "reckless driving," the New Orleans Code of Ordinances also prohibits "careless driving," which is defined as the operation of "any vehicle upon a highway . . . carelessly, and in disregard to the rights and safety of themselves or others . . . ." New Orleans, La., Code of Ordinances §154-383. The Court likewise notes that Louisiana courts have held that "careless operation," as defined under the Louisiana Revised Statutes - which definition is referenced by the New Orleans Code of Ordinances - constitutes an arrestable offense. *State v. Short*, 839 So.2d 173 (La. App. 4 Cir. 2003) ("It is undisputed that the officers saw the defendant commit a traffic offense. At that point, they had probable cause to stop him for the commission of that offense. See *State v. Wilson*, 467 So.2d 503, 515 (La.1985); State v. Diaz, 2001-0523 (La. App. 4 Cir. 10/31/01), 800 So.2d 1090.).").

17 Lockett further notes that, although Ahner testified that Lockett accused Ahner of being a racist and ranted about racism throughout Ahner's presence at the scene (Rec. Doc. 51-7, Deposition testimony of Ahner, pp.69-71), Arceneaux denied hearing this, and none of the other defendants testified regarding the alleged rant. Deposition testimony of Arceneaux, Rec. Doc. 51-4, Exhibit D, p.91. However, Arceneaux's testimony is not as clear-cut as Lockett's characterization of that testimony indicates. In fact, Arceneaux testified that he heard Ahner and Lockett talking but *could not hear* the substance of the conversation that preceded Lockett's

handcuffing. Rec. Doc. 51-4, Exhibit D, p. 91-92. Additionally, Bieber's deposition testimony does not address whether and to what extent he heard Ahner's conversation with Lockett.

18 Mrs. Lockett notes that her husband had recently run for political office, intends to pursue a political career, and has recently begun law school

19 The State Defendants argue that Lockett's level of uncooperativeness is apparent in the audio of his 911 call, manually attached as Exhibit E to Plaintiffs' Opposition.

20 The Court notes at this point that Plaintiffs have not presented either a transcript or the audio of the Incident Recall Log that includes recordings of radio transmissions beginning with Bieber's call regarding the traffic stop and continuing through Lockett's booking. Additionally, the Court notes that the only summary judgment evidence in the record indicates simply that Bieber's call was at 9:13:32 a.m., and that Lockett's 911 call was at 9:13 a.m. as well.

21 The Court recognizes that the § 1983 claims are also asserted against Gains, Clark, and Fletcher as well, but focuses solely on the claims against the MP Defendants in this order and reasons.

22 This two-pronged inquiry was set out in *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). Recently, the Supreme Court modified its holding in Saucier to state that the sequence of this inquiry is no longer mandatory, and that lower courts may use their discretion in deciding whether to apply

the Saucier procedure. *Pearson v. Callahan*, 129 S. Ct. 808, 172 L. Ed. 2d 565, 2009 WL 128768 (2009). Thus, in analyzing the right to qualified immunity, district courts are now free to determine, in whichever order they choose, whether a plaintiff has met the burden of showing that he has alleged an actual constitutional violation or whether the right at issue is clearly established.

23 Lockett cites the Fifth Circuit's holding in Hinojosa v. City of Terrell, Texas, for the analysis required in an excessive force claim under § 1983 and the Fourth Amendment:

> If the state officer's action caused severe injuries, was grossly disproportionate to the need for action under the circumstances, and was inspired by malice rather than merely careless or unwise excess of zeal so that it amounted to an abuse of official power that shocks the conscience, it should be redressed under Section 1983.

834 F.2d 1223, 1229 (5th Cir. 1988) (citing *Coon v. Ledbetter*, 780 F.2d 1158, 1163 (5th Cir.1986)). The Court notes here that Hinojosa does not provide the governing standards for § 1983 excessive force claims under the Fourth Amendment. First, there is no longer a "severe injury" requirement for such claims. *Hudson v. McMillan*, 503 U.S. 1, 4, 112 S. Ct. 995, 117 L. Ed. 2d 156 (1992). Second, the "malice" inquiry is no longer relevant to such claims:

> In an en banc opinion immediately following [the Supreme Court's decision in] Graham, [the Fifth

> Circuit] stated, "A plaintiff can thus prevail on a Constitutional excessive force claim by proving each of these three elements: (1) a significant injury, which (2) resulted directly and only from the use of force that was clearly excessive to the need; and the excessiveness of which was (3) objectively unreasonable . . . . [The Fifth Circuit thereby] overrule[d] all previous decisions of . . . to the contrary." *Johnson v. Morel*, 876 F.2d 477, 480 (5th Cir.1989) (en banc)[]. Thus . . . the excessive force standard had been changed so that the injury had to be "significant" instead of "severe" and also **malice was no longer an element**.

Martin v. Thomas, 973 F.2d 449, 455 (5th Cir. 1992) (concerning excessive force allegations in the context of a wrongful arrest). While the "significant injury" requirement of *Johnson v. Morel* has since been altered to the mere "injury" requirement as noted in Brugman, the "malice" factor of Hinojosa is clearly no longer applicable to excessive force claims in the Fifth Circuit. Thus, Lockett's arguments based on that factor are irrelevant, and the Court's inquiry focuses solely on the objective reasonableness of the force used by the MP Defendants vis-a-vis the need in the circumstances.

24 In any event, the Court does not find that any of the MP Defendants exhibited any actual malice on the present record.

25 There is some question on the present record regarding the number of searches and who performed them. Lockett's testimony indicates that Bieber, Arceneaux, and Ahner all frisked him at various points

during the stop, and that NOPD officer Gains also patted him down. Rec. Doc. 51-1, p. 35 (Bieber), p. 50 (Arceneaux), p. 61 (Ahner), p. 104 (Gains). Bieber's testimony seems to indicate that Arceneaux, and not he, performed the initial frisk. Rec. Doc. 51-3, pp.36-37. Arceneaux testified that only three frisks took place - the first by himself, the second by Ahner, and the third by Gains or Clark. Rec. Doc. 51-4, p. 59-60. In light of the somewhat vague record, the Court will assume that three frisks by the MP Defendants took place in accordance with Lockett's testimony.

26 However, the Court notes the Fifth Circuit's following recognition

> that at least one of our sister circuits has recently suggested that different constitutional standards may apply to stops based on probable cause. See *United States v. Childs*, 277 F.3d 947, 952-54 (7th Cir.2002) (en banc) (noting that the Fourth Amendment allows for a broader range of law enforcement actions where a traffic stop is supported by probable cause); see also *Berkemer v. McCarty*, 468 U.S. 420, 439 n. 29, 104 S.Ct. 3138, 3150 n. 29, 82 L.Ed.2d 317 (1984) ("We of course do not suggest that a traffic stop supported by probable cause may not exceed the bounds set by the Fourth Amendment on the scope of a Terry stop.").

Brigham, 382 F.3d at 506 n.4.

27 Specifically, both Arceneaux and Ahner indicated that there was initially some confusion regarding whether Lockett was, or held himself out to be, an FBI

agent. Arceneaux testified as follows, in reference to the written statement he and Bieber executed after the events of this case:

> Q. The statements from both you and Specialist Bieber then go on to make the next point: "Bieber then asked if he was in the FBI academy." Do you see that?
> A. Yes.
> Q. Do you recall any between the "no" and the "FBI academy?
> A. No, I don't recall.
> Q. "Suspect later learned to be Shawn Lockett responded yes," do you see that?
> A. Yes.
> Q. That's not in quotes?
> A. No, it's not.
> Q. Do you know why?
> A. No, I don't.
> Q. Is it your contention that's the exact word that he used?
> A. Yes. Mr. Lockett responded in the affirmative to that question at first.
> Q. "After further questioning Lockett changed his story." What other questioning? It doesn't tell us what questions he was asked
> A. I don't believe it was a question but I remember Specialist Bieber asking him if he would like us to go talk to his instructor and tell him how he was driving on Hayne Boulevard and at that point Mr. Lockett realized Specialist Bieber was asking him and he said "wait, hold on, hold on. I'm not in the FBI. I'm going to SUNO."

Rec. Doc. 51-4 at pp. 81-82. Additionally, Ahner twice noted the initial confusion and concern over Lockett's responses to the questions regarding the FBI:

A. (Ahner): . . . What I would like to add, however, is that I don't believe there was enough emphasis placed on the fact that Mr. Lockett introduced himself as a member in training with the Federal Bureau of Investigation.
Q. Now, when you say introduced himself as a member, he didn't introduce himself that way to you, you are saying he introduced himself to Bieber and Arceneaux as reported by them?
A. Correct.
Q. To the extent that happened or didn't happen, you wouldn't know one way or the other, other than what was told to you by somebody else?
A. Correct.
Q. Why do you think more information would have been appropriate to stress that fact more than it was stressed in your report?
A. As a law enforcement officer, when an individual attempts to impersonate the police department in any way, shape or form, he normally has another agenda, whatever that agenda may be.

***

Q. During your conversation with Bieber, did he say anything else other than everything was under control and that he would require the presence of a military police supervisor and a New Orleans police officer?
A. He mentioned to me that the individual that he stopped had identified himself as a Federal Bureau of Investigation officer trainee.

Rec. Doc. 51-7, pp. 19-20, 35.

28 These include Lockett's claims for loss of reputation, emotional distress, humiliation, embarrassment, pain and suffering, negligence, and claims under Article 2315.6 by Mrs. Lockett.

29 The Court also notes that there is essentially no discussion in the briefing on the present motions beyond a citation to § 9:2797.1 regarding how and whether the immunity provided under that section would apply to the MP Defendants in these circumstances.

30 The only supplemental state law claims asserted against Thomas are Lockett's claims for intentional infliction of emotional distress, loss of reputation, humiliation, embarrassment, and pain and suffering, as well as Mrs. Lockett's claims for bystander damages under Louisiana Civil Code Article 2315.6. As discussed below, all these claims fail as a matter of law and fact.

31 See Rec. Doc. 51-14, Exhibit M, which consists of various Proclamations of the Louisiana Governor's Office extending the state of emergency initially declared after Katrina and continuing the deployment under state law of the Louisiana National Guard.

32 The Court notes, along with the MP Defendants, that Plaintiffs' state law tort claims against the MP Defendants are brought against them individually, and not against the State. Thus, although the Plaintiffs' claims may have been appropriate as against the State, notwithstanding the MP Defendants' personal immunity under § 29:23, no such claims are before this Court.

U.S. CONST. AMEND IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985 (3)

Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U.S.C. § 1986
Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefore, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

ARTICLE 213
Arrest by officer without warrant; when lawful

(1) The person to be arrested has committed an offense in his presence; and if the arrest is for a misdemeanor, it must be made immediately or on close pursuit;

(2) The person to be arrested has committed a felony, although not in the presence of the officer;

(3) The peace officer has reasonable cause to believe that the person to be arrested has committed an offense, although not in the presence of the officer; or

(4) The peace officer has received positive and reliable information that another peace officer from this state holds an arrest warrant, or a peace officer of another state or the United States holds an arrest warrant for a felony offense.

A peace officer in close pursuit of a person to be arrested, who is making an arrest pursuant to this Article may enter another jurisdiction in this state and make the arrest.

LSA-R.S. 32:391
Appearance upon arrest

A. Whenever any person is arrested for a violation of any provision of this Chapter or any regulation of the department or of the secretary of the Department of Public Safety and Corrections adopted pursuant thereto, except as otherwise provided in this Section, the arresting officer shall take his name, address, the license number of his motor vehicle, and the number of his operator's license, and shall issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons and notice. The arresting officer's original or electronic signature shall be affixed to the summons. The time shall be at least five days after arrest, unless the person arrested demands an earlier hearing. If the person arrested demands an earlier hearing, he shall have a right to an immediate hearing or a hearing within twenty-four hours, at a convenient hour, to be before a magistrate within the parish where the offense was committed. Except as otherwise provided in this Section, the person arrested shall have the option of remaining in custody pending his furnishing bail as fixed by a magistrate or depositing his operator's license with the arresting officer, as provided in R.S. 32:411.

B. If the person arrested holds a Louisiana operator's license and gives his written promise to appear at the time and place stated, the officer may release him from custody or take him immediately before a magistrate, but shall not require the person arrested to deposit his operator's license. Any such person refusing to give the written promise to appear shall be taken immediately by the arresting officer before the nearest or most accessible magistrate having jurisdiction. Any person who willfully violates his written promise to appear shall be punished as provided in R.S. 32:57.1, regardless of the disposition of the charge upon which he was arrested originally. The arresting officer shall fully inform the arrested person of the consequences of failing to honor a written promise to appear pursuant to R.S. 32:57.1.

C. Notwithstanding any other provision of law to the contrary, in any parish having a population in excess of four hundred eighty-two thousand people as determined by the most recent federal decennial census, if the person arrested holds a Louisiana operator's license and gives his written promise to appear at the time and place stated, the officer shall release him from custody, and shall not require the person arrested to deposit his operator's license. Any such person refusing to give the written promise to appear shall be taken immediately by the arresting officer before the nearest or most accessible magistrate having jurisdiction. Any person who willfully violates his written promise to appear shall be punished as provided in R.S. 32:57.1, regardless of the disposition of the charge upon which he was arrested originally. The arresting officer shall fully inform the arrested person of the consequences of failing to honor a written promise to appear pursuant to R.S. 32:57.1.

D. This Section does not apply to any person charged with an offense involving or contributing to an accident resulting in injury or death to any person, or to any person charged with driving while under the influence of intoxicants or narcotics, or to any person whom the arresting officer has good cause to believe has committed any felony or misdemeanor, and in any of these cases the arresting officer shall immediately take the person arrested before the nearest or most accessible magistrate having jurisdiction.

E. This Section does not apply to any person owning or operating a vehicle or combination of vehicles found in violation of R.S. 32:380 through R.S. 32:387.

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(2)

No. 10-178

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

SHAWN M. LOCKETT, ET UX.,

Petitioners

v.

CITY OF NEW ORLEANS, LOUISIANA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR THE STATE RESPONDENTS

JOHN B. DUNLAP III
Counsel of Record
JENNIFER A. FIORE
CARLETON, DUNLAP, OLINDE,
MOORE & BOHMAN, LLC
One American Place,
Suite 900
Baton Rouge, Louisiana 70825
(225) 282-0600
jdunlap@cdomlaw.com

Attorneys for Piyoush "Bobby" Jindal, in his official capacity as Governor of Louisiana, Christopher Ahner, Brandt Arceneaux, Jonathan Bieber and Joseph Thomas

232375

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether Petitioners have presented compelling reasons to grant the Petition when there is no issue of fact relevant to the issue of whether the Defendants had probable cause to stop and arrest Petitioner under the Fifth Circuit's application of *Atwater v. Cityof Lago Vista*, 532 U.S. 318 (2001) and afforded the Defendants immunity?

2. Whether Petitioners have presented a compelling reason to grant the Petition when Petitioners' state law false arrest claims were dismissed as a matter of law on the same qualified immunity basis as Petitioners' civil rights claims?

3. Whether Petitioners have presented a compelling reason to grant the Petition when Petitioners' claim of excessive force was dismissed as a matter of law and the ruling is wholly consistent with the rulings of this Court and the Fifth Circuit itself?

4. Whether Petitioners have presented a compelling reason to grant the Petition when Petitioners' claims under 42 U.S.C. §§ 1985 and 1986 are not supported by facts sufficient to demonstrate a conspiracy to deprive them of equal protection?

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STATEMENT OF THE CASE

The Fifth Circuit's application of the principles of *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), in the instant case does not widen the door for potential abuse by law enforcement as argued by Petitioners. It is only Petitioners' self-serving testimony that creates contradiction of facts. Even when accepting all facts set forth by Petitioners as true, the finding of probable cause and the entitlement of the officers to qualified immunity is sound. The Fifth Circuit's ruling in no way compromises the protections afforded by the Fourth Amendment, nor does it render the citizens invoking its protections powerless.

A. Factual Background

Shawn M. Lockett (individually referred to herein as "Lockett") and his wife, Melanie Lockett (collectively referred to herein as "Petitioners") sued Governor Bobby Jindal in his official capacity, Officer Joseph Thomas ("Thomas") individually and in his official capacity as a Southern University New Orleans ("SUNO") campus police officer, Master Sergeant Christopher Ahner ("Ahner") individually and in his capacity as a Military Policeman ("MP") of the Louisiana Air National Guard, Specialist Jonathan Bieber ("Bieber") individually and in his capacity as a MP of the Louisiana Army National Guard and Sergeant Brandt Arceneaux ("Arceneaux") individually and in his capacity as a MP of the Louisiana Army National Guard. The above Defendants will collectively be referred to herein as the "State Defendants and/or Respondents". At all material times herein Ahner, Bieber and

Arceneaux were serving in the active service of the State of Louisiana by order of the Governor.

Petitioners also sued Ray Nagin, in his official capacity as Mayor of New Orleans, Superintendent Warren Riley, in his official capacity as Superintendent of the New Orleans Police Department, Lieutenant Lynn Fletcher ("Fletcher"), individually and in his official capacity as a Lieutenant in the New Orleans Police Department, Reginald Gains ("Gains"), individually and in his official capacity as a New Orleans Police Officer, and Tocka Clark ("Clark"), individually and in her official capacity as a New Orleans Police Officer. All Defendants when referenced herein will collectively be referred to as "Defendants."

The facts of this case are set forth in detail by the District Court and the Fifth Circuit. The Courts' findings relative to material facts not in dispute are uncontroverted by Petitioners.

B. Proceedings Below

Petitioners correctly set forth the history of the proceedings below.

However, the State Defendants feel compelled to correct Petitioners' mischaracterization of the basis of the Fifth Circuit's holding which sustained the District Court's finding of probable cause. The Fifth Circuit held that there was no genuine issue of material fact with respect to whether the Defendants had probable cause to believe that Lockett was speeding. The Fifth Circuit partially based its holding on a concession contained in Petitioners' appeal brief.

Petitioners argue that the Fifth Circuit's holding was incorrect and that Petitioners did not concede probable cause for the initial stop in their brief. Specifically, Petitioners argue in a footnote that the Fifth Circuit relied in part on a quote from Petitioners' brief. The statement on which the court relied was, according to Petitioners, taken out of context and "[i]n fact, the paragraph in which the statement was made was prefaced by '[e]ven assuming arguendo ...'."

A reading of the paragraph at issue clearly evidences that Fifth Circuit's holding was not based on a quote taken out of context and that Petitioners indeed conceded that probable cause existed at the moment of the stop. The relevant portion of Petitioners' brief upon which the Fifth Circuit relied is as follows:

> Even assuming arguendo that plaintiffs did not raise a genuine material issue of fact, the Court erroneously held that probable cause existed for Lockett's arrest for reckless driving as a matter of law. "Probable cause exists when the totality of the facts and circumstances within a police officer's knowledge at the moment of arrest are sufficient for a reasonable person to conclude that the suspect had committed or was committing an offense." *Refendi v. Miller*, 203 F.3d 902, 903 (5th Cir. 2000). Here, the facts and circumstances known to the officers at the moment of the traffic stop did not give rise to probable cause for an arrest. **At the moment of the traffic stop, Bieber and Arceneaux arguably had probable cause to stop Lockett for careless driving.**

(emphasis added). The Fifth Circuit pointed out that in his brief Lockett did not challenge the probable cause the officers had to make the traffic stop based on his speeding. Instead, Lockett asserted that probable cause for a traffic stop is separate and distinct from the probable cause necessary to affect an arrest when the initial probable cause for the traffic stop is insufficient for the arrest.

Applying the principles of *Atwater v. City of Lago Vista*, *supra*, the Fifth Circuit correctly held that because the Defendants had probable cause to believe that Lockett had been driving in violation of the speed limit, the arrest did not violate a clearly established constitutional right.

REASONS FOR DENYING THE PETITION

Petitioners present no compelling reasons for their Petition for a Writ of Certiorari to be granted. The Fifth Circuit rendered an opinion wholly consistent with the usual course of judicial proceedings and *stare decisis* on the issues presented in this case.

Qualified Immunity

In *Hunter v. Bryant*, 502 U.S. 224, 228, (1991), this Court made clear that the question of qualified immunity was a question for the court, and not the trier of fact. Qualified immunity "protects law enforcement officers from 'bad guesses in gray areas' and ensures that they are liable only for 'transgressing bright lines.'"

Short v. Smoot, 436 F.3d 422, 426 (4th Cir. 2006) (citing *Maciariello v. Summer*, 973 F.2d 295, 298 (4th Cir. 1992)).[1]

In a § 1983 action for civil damages, in order to overcome the defense of qualified immunity afforded a governmental official performing discretionary functions, the plaintiff is required to show that the official violated clearly established statutory or constitutional rights of which a reasonable person would know. *Conn v. Gabbert*, 526 U.S. 286, 290 (1999) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Under the standard established in *Harlow v. Fitzgerald*, Petitioners may not rebut a defense of qualified immunity by presenting evidence that the defendants' conduct was "malicious or otherwise improperly motivated." *Crawford-El v. Britton*, 523 U.S. 574, 588 (1998). Evidence concerning the defendants' subjective intent is simply irrelevant to a qualified immunity defense. *Id.*

Recently, this Court in *Brosseau v. Haugen*, 543 U.S. 194 (2004), admonished the Ninth Circuit Court of Appeals for misapplying the qualified immunity standard and reemphasized the standard to be applied in all cases. This Court reaffirmed that "[q]ualified immunity shields an officer from suit when [he] makes a decision that, even if constitutionally deficient, reasonably misapprehends the law governing the circumstances [he] confronted." *Id.* at 198 (citing *Saucier v. Katz*, 533 U.S. 194, 206 (2001) ("qualified immunity operates to protect officers from the sometimes hazy border between excessive and acceptable force")). "Because the focus is on whether the officer had fair notice that her conduct was unlawful," this Court continued, "reasonableness is judged against the backdrop of the law at the time of the conduct. If the law at that time did not clearly establish that the officer's conduct would violate the Constitution, the officer should not be subject to liability or, indeed, even the burdens of litigation." *Id.* Thus, the relevant question the court must ask is whether, at the time of the officers' actions, it was clearly established that what he was doing violated the plaintiff's Fourth and Fourteenth Amendment rights. *Id.* at 199–201.

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[1] Qualified immunity is also available for public officials in actions for racial discrimination brought pursuant to 42 U.S.C. § 1981. *Wicks v. Mississippi State Employment Services*, 41 F.3d 991, 996 n.21 (5th Cir. 1994). In addition, conspiracy claims under 42 U.S.C. § 1985 are also subject to qualified immunity. *See Tonkovich v. Kansas Board of Regents*, 159 F.3d 504, 533 (10th Cir. 2001) (held plaintiff's conclusory allegations of conspiracy were insufficient to overcome the defendant's qualified immunity defense.)

Question (1) Presented By Petitioners:

Whether, under this Court's decision of *Atwater v. City of Lago Vista*, qualified immunity may be afforded and 42 U.S.C. § 1983 false arrest and unlawful search and seizure claims arising out of an allegedly racially motivated traffic stop may be dismissed as a matter of law when the facts relevant to a probable cause determination are disputed.

Respondents' Reply:

There is no issue of fact relevant to whether the Defendants had probable cause to stop and ultimately arrest Lockett for reckless driving. The Fifth Circuit correctly applied the principles of *Atwater v. City of Lago*, *supra*, and afforded the State Defendants immunity.

Petitioners have not, until now, challenged whether the officers had probable cause to make the traffic stop based upon Lockett's speeding. Their attempt to argue that Lockett did, and does, contest probable cause for the initial stop is not evidenced by the facts and previous arguments made in this case. It is undisputed that Lockett never denied that he was speeding. Petitioners' attempt to twist this reality by saying that "[i]t is undisputed that Lockett's testimony is that he was driving with the flow of traffic" is unpersuasive.

Further, Petitioners' assertion that a material fact exists as to whether the Defendants fabricated traffic violations in an attempt to justify a retaliatory arrest made as a result of his claim of race discrimination is unsupported. Contrary to the argument of counsel, there is no evidence in the record, except Lockett's self-serving testimony, that National Guardsmen Bieber and Arceneaux "fabricated" traffic violations. More importantly, precedent, "clearly dictates [that] subjective intent, motive, or even outright animus are irrelevant in a determination of qualified immunity based on arguable probable cause to arrest, just as an officer's good intent is irrelevant when he contravenes settled law." *Mendenhall v. Riser*, 213 F.3d 226, 231 (5th Cir. 2000).

"[T]he determination of reasonable suspicion for an investigatory stop, or probable cause for arrest, does not rest on the officer's subjective beliefs or attitudes, but turns on a completely objective evaluation of *all* the circumstances known to the officer at the time of the challenged action. *State v. Landry*, 98-0188, p. 2 (La. 1/20/99); 729 So. 2d 1019, 1020; *State v. Arnold*, 34,194 (La. App. 2 Cir. 12/6/00); 779 So. 2d 840, 845. When an officer observes what he objectively believes is a traffic offense, the decision to stop the vehicle is reasonable. *Whren v. U.S.*, 517 U.S. 806, 810 (1996).

The "constitutional torts" of false arrest, unreasonable seizure, and false imprisonment require a showing of no probable cause. *Mendenhall*, 213 F.3d 226, 230 (holding that qualified immunity protects government officials from a charge of wrongful arrest where a reasonable official would believe probable cause was present). For immunity to be lost, "there must not even 'arguably' be probable cause for the arrest." *Hart v. O'Brien*, 127 F.3d 424, 444 (5th Cir. 1997), *rev'd on other grounds, Kalina v. Fletcher*, 522 U.S. 118 (1997). That is, if a reasonable officer could have concluded that there was probable cause upon the facts then available to him, then an arrest would be constitutional. *Beck v. Ohio*, 379 U.S. 89 (1964). This case says nothing about qualified immunity, only about probable cause. More accurately: then the arrest does not violate the constitution. Because this arrest did not violate the constitutional rights of the accused, the officer is entitled to qualified immunity.

This Court summarized the definition of probable cause perfectly more than fifty years ago in *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) as follows:

> In dealing with probable cause, . . . as the very name implies, we deal with probabilities.

> These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. . . .
>
> The substance of all the definitions of probable cause is a reasonable ground for belief in guilt. And this means less than evidence which would justify condemnation or conviction. Probable cause exists where the facts and circumstances within their (the officers') knowledge, and of which they had reasonably trustworthy information, (are) sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.

(internal quotation marks and citations omitted). Further, the determination of probable cause, unlike the determination of guilt at trial, "does not require the final resolution of conflicting evidence" required at trial, and "credibility determinations are seldom crucial in deciding whether the evidence supports a reasonable belief" that the person to be arrested has committed a crime. *Gerstein v. Pugh*, 420 U.S. 103, 121 (1975).

In the instant case Bieber and Arceneaux witnessed Lockett commit multiple traffic violations in an area prevalent with youth pedestrian traffic. The perception of these officers was that they had probable cause to stop Lockett. Probable cause existed for Lockett's arrest and he has therefore failed to show that he was deprived of a constitutional right. "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence," even as minor as a seat belt violation, "he may, without violating the Fourth Amendment, arrest the offender." *Atwater*, 532 U.S. at 354.

Petitioner's assertion that an officer admitted that Lockett was detained because he called 911 is of no moment. Moreover, the Fifth Circuit found that it was Lockett's action in calling 911 that continued the duration of the initial stop. Lockett's involvement of the New Orleans Police Department ("NOPD") and his escalation of the incident required the Defendants' continued presence at the scene.

Further, the Fifth Circuit found that the duration of Lockett's stop was lengthened because Lockett failed to have current proof of insurance in his possession as required by Louisiana law and because Lockett made three phones calls during the stop: (1) to his insurance company in an attempt to obtain proof of insurance (which was unsuccessful); (2) to the 911 operator; and (3) to his wife requesting that she meet him at the scene. Further, the Fifth Circuit found that the transfer of custody of Lockett from the Louisiana National Guard to the NOPD added to the length of the detention. In light of these circumstances, the Fifth Circuit found that the length of the detention was not unreasonable.

Contrary to Petitioners' claim, the record is replete with evidence that the State Defendants' safety was a valid concern and that the searches of Lockett's person were reasonable given the totality of the circumstances. The District Court found that there was concern that Lockett initially identified himself as an FBI agent.

Regardless of whether this initial mis-identification was the result of a misunderstanding or confusion, the possibility that Lockett was improperly identifying himself as a law enforcement officer, especially at such an early stage of the stop, would clearly have been of some concern to the State Defendants vis-a-vis their safety.

The District Court found that this initial concern, combined with the failure of Lockett to provide proof of insurance, the multiple telephone calls Lockett made during the stop, and the escalating nature of the stop as described by both Arceneaux, who indicated that Lockett "was very worked up" and "might become angry to the point of combativeness," as well as by Lockett himself, who testified that when he called 911 "the situation look[ed] like it [was] getting out of hand," resulted in the State Defendants' reasonable concern for their safety, which in turn prompted the frisks. This was an unusual traffic stop and "[t]he reasonableness of a Fourth Amendment search depends on the circumstances under which the search was conducted." *United States v. Garcia*, 319 F.3d 726, 731 (5th Cir. 2003). Moreover, this Court has held that "in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *United States v. Robinson*, 414 U.S. 218, 235 (1973).

"Qualified immunity allows for officers to make reasonable mistakes about whether their conduct violates the law, and an officer's mistake is reasonable when there are insufficient indicia that the conduct in question was illegal." *Lytle v. Bexar County, Tex.*, 560 F.3d 404, 410 (5th Cir. 2009). In this case, any mistake by the State Defendants in frisking Lockett was reasonable given the events of the stop and the uncertainty of the law regarding the permissible scope of probable cause traffic stops. Thus, the Fifth Circuit properly held that the State Defendants were entitled to qualified immunity as to Lockett's unconstitutional search claims.

Question (2) Presented By Petitioners:

Whether, under this Court's decision in *Atwater v. City of Lago Vista*, a state law false arrest claim arising out of alleged traffic violations may be dismissed as a matter of law absent a review of relevant state law.

Respondents' Reply:

The State Defendants were entitled to summary judgment as a matter of law and fact as to Lockett's state law claims of assault and battery. *See Gerard v. Parish of Jefferson*, 424 So. 2d 440, 444 (La. App. 5 Cir. 1982) ("A lawful arrest is a defense to the intentional tort of battery when reasonable force is used to effect such an arrest.") Likewise, Lockett's state law claims for false arrest, false imprisonment, and malicious abuse of process were properly dismissed by the District Court on the same qualified immunity basis as the civil rights claims.

"Under Louisiana law, the tort[ ] of false arrest . . . require[s] malice as an essential element." *Jenkins v. Baldwin*, 00-0802, p. 17 (La. App. 4 Cir. 8/29/01); 801 So.

2d 485, 497. "Malice may be inferred from a lack of probable cause, or from a finding that the defendant acted in reckless disregard of the other person's rights." *Id.*

The purported quoted language from the case of *Garrett v. City of Bossier City*, 792 So. 2d 24 (La. App. 2 Cir. 6/20/01), cited by Petitioners in support of their argument that the lower courts improperly dismissed Lockett's state law claims, is not found within the case. Moreover, *Garret* has no bearing on the analysis undertaken by the lower courts in dismissing Petitioners' state law claims. As discussed in the analysis of Lockett's federal claims, the present record does not support any showing of malice on the part of the defendants, and thus the defendants were entitled to summary judgment on these claims as well.

Question (3) Presented By Petitioners:

Whether the claim of excessive force under the Fourth Amendment is restricted to plaintiffs who demonstrate more than a de minimis injury and allege injury caused by more than handcuffing too tightly.

Respondents' Reply:

The findings of the Fifth Circuit with respect to Lockett's excessive force claim are not inconsistent with the rulings of this Court or the Fifth Circuit itself. Lockett bases his excessive force claim on injuries to his wrist and alleges that the multiple searches of his person constituted excessive use of force. To establish an excessive use of force claim, a plaintiff must demonstrate "(1) an injury (2) which resulted directly and only from the use of force that was excessive to the need and (3) the force used was objectively unreasonable." *Glenn v. City of Tyler*, 242 F.3d 307, 314 (5th Cir. 2001) (internal quotation marks omitted). Further, the "injury must be more than a *de minimis* injury and must be evaluated in the context in which the force was deployed." *Id.*

Lockett asserts that he sustained an injury to his wrists when Ahner affixed the handcuffs too tightly, causing him pain. The District Court disagreed and in its opinion quoted Lockett's own testimony to refute this allegation. Specifically, the Fifth Circuit's opinion highlighted Lockett's testimony wherein Lockett stated that, at one point, Arceneaux removed the handcuffs and allowed him to stretch his arms before putting the handcuffs back on in a much more appropriate way. The District Court further found that Lockett testified that after the handcuffs were placed back on, he was much more comfortable. Subsequently, NOPD Officer Gains took off the handcuffs belonging to the National Guard and replaced them with NOPD handcuffs. At that point, Lockett testified he was once again allowed to stretch his arms.

Further, the District Court and Fifth Circuit found that Lockett admitted that he did not complain to the Defendants about pain in his wrists while he was handcuffed, and the jail's medical intake screening form does not indicate that Lockett complained of pain. However, after being released Lockett and his wife met with Major Douget of the National Guard, and he complained that the handcuffs had hurt his wrist. Also, several days later, Lockett visited a physician, complaining of pain in his wrists. The court's further highlighted Lockett's testimony wherein he stated that he was not currently under his physician's care for the wrist injury. Lockett's claim boils down to an allegation that the handcuffs were too tight.

Such a claim, without more, does not constitute excessive force: "handcuffing too tightly, without more, does not amount to excessive force." *Glenn*, 242 F.3d at 314; *see also Freeman v. Gore*, 483 F.3d 404, 417 (5th Cir. 2007) (rejecting as *de minimis* the plaintiff's claim that the deputies twisted her arms behind her back while handcuffing her, jerked her around while she was cuffed, and applied the handcuffs too tightly, causing bruises and marks on her wrists and arms). In the instant case, there has been no showing of malice, only Lockett's allegations that Bieber made a racial comment. The findings of the Fifth Circuit and its application of the principles espoused in *Glenn* are sound and should not be revisited by this Court.

Lockett also contends that the Defendants' multiple searches of his person constitute excessive use of force. However, Lockett failed to allege an injury resulting from the pat downs. Moreover, the Fifth Circuit found that Lockett's deposition testimony completely undermined his claim that the searches constituted excessive use of force. Specifically, the Fifth Circuit's opinion provides as follows: When Lockett was asked "[d]o you think there was anything inappropriate in the way [Bieber] searched you?" he responded: "No. It seemed like a standard search to me." Lockett also testified that Arceneaux searched him "[a]ppropriately." With respect to Ahner's search of his person, Lockett testified that

Ahner's pat down was similar in manner to the previous two pat downs. Lockett further testified that when he was transferred to the custody of the NOPD, Officer Gains performed a "[g]eneral pat down."

In light of the above testimony and the lack of a "more than *de minimis* injury," Lockett has failed to make a claim of excessive use of force with respect to the pat downs. Thus, the Defendants were properly afforded qualified immunity with respect Lockett's claim of excessive use of force.

Question (4) Presented By Petitioners:

Whether claims asserted under 42 U.S.C. §§ 1985 and 1986 alleging discriminatory animus and facts in support thereof may be dismissed for lack of discriminatory animus as a matter of law absent a factual determination of discriminatory animus by a trier of fact.

Respondents' Reply:

Section 1985(3) prohibits, among other things, conspiracies to deprive any person equal protection of the laws. To state a claim under § 1985(3), a plaintiff must allege facts demonstrating (1) a conspiracy; (2) for the purpose of depriving a person of the equal protection of the laws; and (3) an act in furtherance of the conspiracy; (4) which causes injury to a person or a deprivation of any right or privilege of a citizen of the United States. *Hilliard v. Ferguson*, 30 F.3d 649, 652-53 (5th Cir. 1994). Additionally, the conspiracy must also have a racially based animus. *Id.* at 653.

Lockett asserts that the Defendants conspired to deprive him of his constitutional rights based on his race and that the Fifth Circuit erred because he created a genuine issue of fact with respect to this claim. Lockett points to the following statement Bieber made to Lockett: "You need to go to SUNO." From this short statement, Lockett testified that he understood Bieber meant that: "SUNO being an African-American university and him telling me that I need to go there as a substandard school that obviously he was insinuating that an African-American school was a substandard school."

Both the District Court and the Fifth Circuit held that Bieber's statement as alleged by Lockett does not demonstrate the racial animus needed to raise a genuine issue of material fact. This conclusion was supported by the undisputed fact that, although the driveway upon which the traffic stop occurred lead both to the FBI building and SUNO, when Lockett told Bieber he was going to class, Bieber assumed Lockett meant he was in training with the FBI—not SUNO. Moreover, as set forth above, the Defendants had probable cause to stop and arrest Lockett. He was not detained for an unreasonable length of time and the Defendants' patdown searches of him have not been shown to have violated clearly established rights. Indeed, Lockett's deposition testimony describing the Defendants' treatment of him during the searches (and adjustment of his handcuffs) undermine any allegation of an act intended to injure him.

Further, there is no evidence that Arceneaux commenced the stop because of Lockett's race. There is also no evidence that Arceneaux, Ahner and Fletcher made or had any connection with the alleged "racially charge statement." Ahner and Fletcher were not even present when Bieber allegedly stated "you need to go to SUNO."

The absence of any evidence of racial animus defeats a § 1985(3) claim. *Griffin v. Breckenridge*, 403 U.S. 88, 101 (1971). In this case, Petitioners have not produced evidence of racial animus attributable to Arceneaux, Ahner, or Fletcher, and thus Lockett cannot demonstrate a conspiracy to deprive him of equal protection and the required act in furtherance of the conspiracy that caused injury or deprivation of any right.

CONCLUSION

The Fifth Circuit correctly affirmed the District Court's grant of summary judgment. As such, Petitioners Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN B. DUNLAP III
Counsel of Record
JENNIFER A. FIORE
CARLETON, DUNLAP, OLINDE,
MOORE & BOHMAN, LLC
One American Place,
Suite 900
Baton Rouge, Louisiana 70825
(225) 282-0600
jdunlap@cdomlaw.com

Attorneys for Piyoush "Bobby" Jindal, in his official capacity as Governor of Louisiana, Christopher Ahner, Brandt Arceneaux, Jonathan Bieber and Joseph Thomas